In the Supreme Court of the United States.

OCTOBER TERM, 1922.

THE UNITED STATES OF AMERICA, plaintiff, *v.* THE STATE OF OKLAHOMA.	No. 25, Original.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This is an original bill against the state of Oklahoma brought in this court by the United States, seeking to establish its claim as a prior creditor in the funds of an insolvent state bank.

The bill avers that the United States, as guardian of noncompetent Indians of the Five Civilized Tribes in the state of Oklahoma, has received large sums of money arising from leases of lands belonging to restricted Indians of those tribes which the Secretary of the Interior was authorized by the act of May 25, 1918 (ch. 86, 40 Stat. 561, 592), to deposit in the banks of Oklahoma; that on October 26, 1921, and for several years prior thereto, there was situated at Guthrie, Oklahoma, a banking institution known as the Okla-

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homa State Bank, incorporated under the laws of that state and engaged in a general banking business.

The bill further avers that pursuant to the act of May 25, 1918, the Secretary of the Interior caused to be deposited in the bank at Guthrie certain sums of money received on behalf of restricted and noncompetent Indians, such deposits having been made, under rules and regulations prescribed by the Secretary, in the name of the cashier and special disbursing agent of the Five Civilized Tribes, on time deposit bearing interest at the rate of 4¾ per cent per annum, and that on October 26, 1921, the sum so deposited amounted to $42,000; that before the deposits were made the secretary required the bank to deliver to the United States a bond, with the Fidelity & Casualty Company of New York as surety, to secure the payment of such money, which bond is in full force and effect.

The bill further alleges that on October 7, 1921, a bank examiner of the state of Oklahoma, in the discharge of his duties, made an investigation of the Oklahoma State Bank at Guthrie, and found that it was insolvent and unable to pay its debts, whereupon he reported the matter to the bank commissioner of the state who, on October 26, 1921, and pursuant to the authority vested in him by the laws of that state, adjudged the bank to be insolvent, and took charge of its records, books, and assets for the purpose of liquidation; that he still has charge of the same, and that on the date last named the sum of $42,000 was

due by the bank to the United States, no part of which has been paid.

The bill proceeds to allege that the assets of the bank in the hands of the bank commissioner are in excess of the government's claim of $42,000, and that by virtue of the provisions of § 3466 of the Revised Statutes, the United States is entitled to have its debts first satisfied and paid in full before other creditors are paid anything; and demand has accordingly been made on the bank commissioner to pay the $42,000, with interest from October 26, 1921; but, the bill alleges, this demand has been refused upon the ground that the state of Oklahoma under its laws has a prior lien upon the assets of the bank for the benefit of the depositors' guarantee fund for the purpose of paying the bank's unsecured depositors and creditors, and upon the further ground that the United States deposited the money with full knowledge of the statutory laws of Oklahoma, which provide for and create a lien for the benefit of depositors, and that when the deposit was made by the United States the latter thereby consented to the method of administration prescribed by the state laws in the event of insolvency, and that the act of making the deposit was, therefore, a waiver of the rights of the United States under § 3466 of the Revised Statutes.

The bill accordingly prays that the State bank commissioner be enjoined from paying out any of the assets of the bank before the debt due the United

States has been fully paid, and that the defendant, through its bank commissioner, be required to pay the debt due the United States before paying out any of its funds to any other person.

The state of Oklahoma has filed a motion to dismiss the bill upon the following grounds:

A. That § 3466, Revised Statutes, is inapplicable and unenforceable against the state in the administration of the liquidation of a state bank.

B. That the state has, under its laws, a lien upon all the assets of the bank for its reimbursement by reason of its payment to the unsecured depositors of the bank, and that the alleged rights of the United States are inapplicable against the state until the obligation for which the lien was given is fully paid and satisfied.

C. That § 3466, Revised Statutes, is invalid in so far as it asserts priority of payment of a debt due the United States in opposition to the payment of a debt due the state.

ARGUMENT.

I.

This court has jurisdiction of the cause.

The state of Oklahoma is the proper party defendant and this court has original jurisdiction. When a state bank in Oklahoma becomes insolvent the state, by the action of its bank commissioner, acquires title to the bank's assets. *State* v. *Cockrell*, 27 Okla. 630. Consequently a suit against the bank

commissioner is in effect a suit against the state. *Lankford* v. *Platte Iron Works Co.*, 235 U. S. 461; *American Water Co.* v. *Lankford*, *id.* 496; *Farish* v. *State Banking Board*, *id.* 498.

In the cases cited it was held that a suit against the state banking board and the bank commissioner to compel payments from and distribution of the depositors' guaranty fund is a suit against the state, and therefore, under the eleventh amendment, can not be maintained in the federal court. But the holding that such a suit can not be maintained in the federal court has, of course, no application to a suit instituted against the state by the United States in this court.

II.

Assets of an insolvent State bank in Oklahoma are subject to the Government's claim as a prior creditor under Revised Statutes of the United States, § 3466.

This statute provides:

> Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by

> process of law, as to cases in which an act of bankruptcy is committed.

From this it will be seen that whenever a debtor is divested of his property in any of the ways mentioned in the section quoted, the "person who becomes invested with the title is thereby made a trustee for the United States and is bound to pay their debt first out of the proceeds of the debtor's property." *Beaston* v. *Farmers' Bank*, 12 Pet. 102, 132. But, to entitle the United States to priority, there must be bankruptcy or insolvency as the latter is defined by the statutes or the authorities.

The bank in this case was adjudged insolvent by the bank commissioner, who under the law was authorized to take such action.

Section 302 of the Revised Laws of Oklahoma, 1910, provides:

> * * * Whenever the bank commissioner shall become satisfied of the insolvency of any such bank or trust company, he may, after due examination of its affairs, take possession of said bank or trust company and its assets and proceed to wind up its affairs and enforce the personal liability of the stockholders, officers, and directors.

From the allegations of the bill it will be seen that the bank was adjudged insolvent pursuant to the provisions of the state laws, and the situation is one where, under R. S. § 3466, the United States is entitled to be paid first. The position of the bank commissioner in taking charge of the bank's

affairs and collecting and distributing its assets is, under the state decisions, analogous to that of a receiver or trustee in bankruptcy or of an assignee for the benefit of creditors. *Briscoe* v. *Hamer*, 50 Okla. 281.

As stated, therefore, the case is one where the United States is entitled to be paid first, unless by reason of §303 of the state laws the state itself has a prior lien on the bank's assets for the benefit of the depositors' guaranty fund.

Section 303, Revised Statutes of Oklahoma of 1910, provides:

> In the event that the bank commissioner shall take possession of any bank or trust company which is subject to the provisions of this chapter, the depositors of said bank or trust company shall be paid in full, and when the cash available or that can be made immediately available of said bank or trust company is not sufficient to discharge its obligations to depositors, the said banking board shall draw from the depositors' guaranty fund and from additional assessments, if required, as provided in section 300, the amount necessary to make up the deficiency; and the state shall have, for the benefit of the depositors' guaranty fund, a first lien upon the assets of said bank or trust company, and all liabilities against the stockholders, officers and directors of said bank or trust company and against all other persons, corporations, or firms. Such liabilities may be enforced by the State for the benefit of the depositors' guaranty fund.

It will thus be seen that the lien of the state does not attach until the bank commissioner takes possession of the bank and its assets. Before he may do that, he must find the bank to be insolvent, and immediately upon his doing that the priority of the United States attaches. The state, therefore, has no anterior lien such as would take precedence over the claim of the United States.

Moreover, it has been decided that the laws of the state can not create priority in favor ofother creditors and so defeat the priority of the United States. *Field* v. *United States*, 9 Pet. 182, 200. In the case just cited, it is said:

> The local laws of the state could not and did not bind them (the United States) in their rights. They could not create a priority in favor of other creditors in cases of insolvency which should supersede that of the United States. The priority of the latter attached by the laws of the United States.

That priority does not yield to any claim of creditors, however high may be the dignity of their debt. *Conard* v. *Atlantic Insurance Co.*, 1 Pet. 386. What the laws of the state may provide is therefore immaterial, the federal law being paramount and controlling.

There is no force in the argument that by depositing the money in the state bank the United States consented to the state's method of distributing the bank's funds and thereby waived its claim to priority, because Congress alone has power to waive rights of

the government, and there is no pretence that Congress has done so in this case.

Nor was the United States compelled to proceed on the bond of the surety company before enforcing its direct remedy against the debtor, for the settled rule of equity is to the contrary. *Lewis* v. *United States*, 92 U. S. 618.

III.

The United States is entitled to priority in regard to moneys which it has deposited as guardian of the Indians.

It has been held that in determining the priority of the government, the form of the indebtedness is immaterial, and it may be either legal or equitable. *Lewis* v. *United States, supra.*

The money deposited in this case was trust money held by the United States for the benefit of restricted Indians. The bank did not know the Indians in the transaction but dealt only with the government. The money was not deposited by the Indians or at their suggestion, but was placed in the bank by the Secretary of the Interior pursuant to the provisions of the act of May 25, 1918; and if there is any loss it must be ultimately borne by the government and not by the Indians.

There is no reason either in logic or in law why the government should not be given priority in such a case as this, because, just as this money was held by it in trust for the Indians, so is other money belonging to it held in trust for the whole people of the

country. *Van Brocklin* v. *Tennessee*, 117 U. S. 151, 158.

A case in point is that of *Allen* v. *United States*, 17 Wall. 207. In that case, Russell, Majors, and Waddell, partners in business, being insolvent, executed deeds of assignment to Allen and one Massey, conveying all their property in trust for their creditors. Following that conveyance the assignees sold to the United States a portion of the property thus conveyed, consisting of wagons and oxen, for a sum exceeding $112,000. Of the sum mentioned only a part was paid by the United States, leaving a balance of $71,491, payment of which was refused. Thereupon, Allen and Massey filed suit in the Court of Claims for the balance.

Prior to their assignment Russell, Majors, and Waddell had collusively received from the disbursing clerk of the Interior Department certain bonds held by the United States in trust for various tribes of Indians, amounting in the aggregate to $870,000. These were bonds of certain of the states in which Indian money had been invested and the bonds were placed in the Interior Department for safekeeping. These bonds were used by Russell, Majors, and Waddell and were not thereafter returned to the government. 5 Ct. Cl. 339.

The government contended that it was entitled to set-off against the claim of Allen, as assignee, the debt due by Russell, Majors, and Waddell on account of their illegal conversion of the Indian trust

bonds. And this court sustained that contention, holding that the government was entitled to priority of payment as to that debt.

It is true that in the *Allen case* the money was invested in the state bonds pursuant to treaty stipulations (act of July 12, 1862, 12 Stat. 539), but that does not alter the case, because, since the passage of the act of March 3, 1871, embodied in §2079, R. S., Congress has seen fit to govern Indian tribes by acts of Congress rather than through treaties.

If by taking these Indian trust bonds from the possession of the Secretary of the Interior, Russell, Majors, and Waddell became indebted to the United States, to satisfy which the latter was entitled to priority of payment from funds in the hands of the assignees, it seems to be equally clear that the United States is entitled to priority in the matter of the Indian money which it had deposited in the State bank in this case, because, just as Congress by act of July 12, 1862, *supra*, ordered the Indians credited with the amount of the trust bonds that had been stolen in the *Allen case*, so here in the event of loss through failure of the bank it will be bound to credit the Indians with the amount of such loss, since the money was deposited pursuant to act of Congress.

The relation of the United States to these Indians is set forth in the decision of this court in *Heckman* v. *United States*, 224 U. S. 413, 444, where Mr. Justice

Hughes, who delivered the opinion of the court, used the following language:

> There can be no more complete representation than that on the part of the United States in acting on behalf of these dependents—whom Congress, with respect to the restricted lands, has not yet released from tutelage. Its efficacy does not depend upon the Indian's acquiescence. It does not rest upon convention, nor is it circumscribed by rules which govern private relations. It is a representation which traces its source to the plenary control of Congress in legislating for the protection of the Indians under its care, and it recognizes no limitations that are inconsistent with the discharge of the national duty.

It is therefore respectfully submitted that a decree should be entered declaring the United States to be a preferred creditor of the state in the sum of $42,000, with interest from October 26, 1921, and directing the state to pay the amount out of the trust fund in its hands to the exclusion of the claims of any other creditor.

JAMES M. BECK,
Solicitor General.
WILLIAM D. RITER,
Assistant Attorney General.
S. W. WILLIAMS,
Special Assistant to the Attorney General.

NOVEMBER, 1922.

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In the Supreme Court of the United States

October Term, 1922.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

THE STATE OF OKLAHOMA,
Defendant.

No. 25
Original

BRIEF FOR THE STATE OF OKLAHOMA

In Support of Motion to Dismiss.

George F. Short,
Attorney General of Oklahoma.

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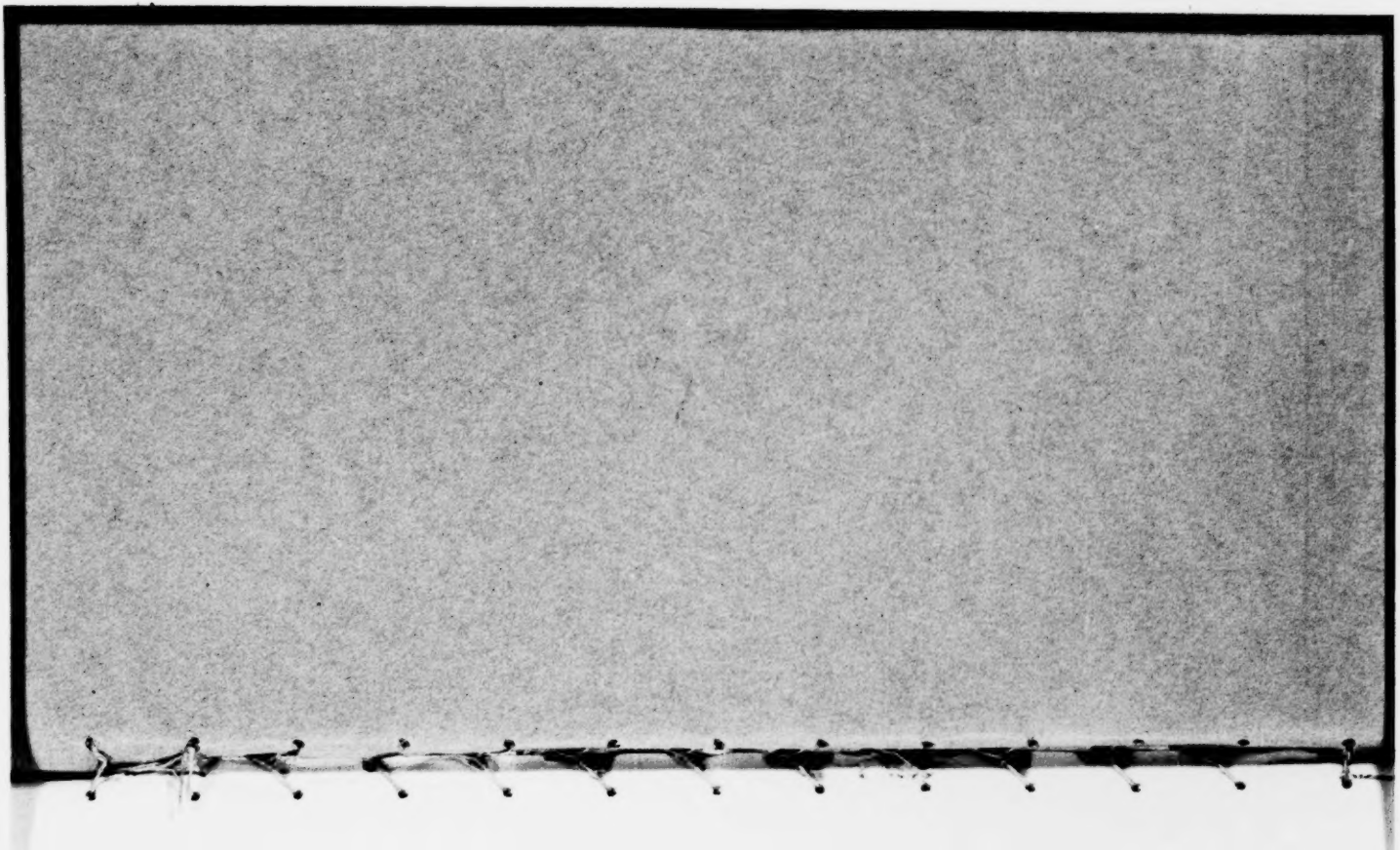
Assistant Attorney General of Oklahoma.
Attorneys for the State of Oklahoma.

Barlow Publishing Company.



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Acts of Bankruptcy.

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In the Supreme Court of the United States

OCTOBER TERM, 1922.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

THE STATE OF OKLAHOMA,
Defendant.

No. 25
Original

Pleadings in Case.

In this case, the United States of America has filed their bill of complaint against the State of Oklahoma, which is as follows:

> "The United States of America, by its Attorney General and its Solicitor General, brings this suit against the State of Oklahoma, and alleges and shows as follows:
>
> I.
>
> That the plaintiff is guardian of incompetent and restricted Indians residing within its territorial confines, and especially of those Indians who are alloted members of the Cherokee, Creek, Choctaw, Chickasaw, and Seminole Tribes or Nations, commonly known as the Five Civilized Tribes, resident in the defendant State; that the United States, through its Congress, from time to time has enacted

laws governing the care of property and estates held in the names of such incompetent and restricted Indians, including the care, custody, management, and control of their individual funds; that the agency of the plaintiff in the discharge of its duties as such guardian is the Department of the Interior, and that the Secretary of the Interior is the person invested with the execution and administration of such laws as the plaintiff, through its Congress, has enacted from time to time for the care, management, and control of the property of its wards aforesaid; and that in the administration of these laws the Secretary of the Interior is aided by subordinate officers and employes under appropriate rules and regulations.

II.

That in the execution of the trust aforesaid large sums of money, of which the sums hereinafter mentioned were a part, principally accruing from royalties and bonuses received on account of oil and gas mining leases, made with the approval of the Secretary of the Interior, of lands alloted to said incompetent and restricted Indians who are enrolled members of the Five Civilized Tribes residing in Oklahoma, have come into the custody and control of the Secretary of the Interior, the same having been paid by the lessees and debtors of said Indians, under the rules and regulations provided by him, into the office of the superintendent of the Five Civilized Tribes at Muskogee, Oklahoma.

III.

That by an act of Congress approved May 25th, 1918 (ch. 86, 40 Stat. 561, 592), it was provided that the funds of the Five Civilized Tribes, and of the individual members thereof, held in trust by the Secretary of the Interior, "shall be deposited in the banks of Oklahoma or in the United States

Treasury and may be secured by the deposit of United States bonds."

IV.

That on October 26th, 1921, and for several years prior thereto, there was situated at Guthrie, Oklahoma, a banking institution incorporated under the laws of that State, engaged in the general banking business under the name of Oklahoma State Bank.

V.

That on or about March 8, 1921, the Secretary of the Interior, through his agent and under regulations by him prescribed and pursuant to the authority of the act of May 25th, 1918, *supra*, caused to be deposited in that bank certain sums of money which had been paid into the office of the superintendent of the Five Civilized Tribes on account of certain individual members and allottees of the Five Civilized Tribes who were incompetent and restricted, and which, under the law and regulations, were held in trust by the Secretary of the Interior as the agent of the plaintiff and in the discharge of his duties as guardian of such Indians, and were collected and deposited, under the rules and regulations approved by the Secretary in the name of the cashier and special disbursing agent for the Five Civilized Tribes, on time deposit, bearing interest at the rate of 4 3-4 per cent per annum, subject to withdrawal by him from time to time as the individual needs of any of said wards required for their benefit; and that on October 26th, 1921, the sum so deposited amounted to not less than $42,000.

VI.

That on February 10, 1921, and before the deposit aforesaid was made, the Secretary of the Interior required and the Oklahoma State Bank delivered to the United States of America a bond with

the Fidelity and Casualty Company of New York as surety, to secure the payment of said funds, which bond was on October 26, 1921, and still is, in full force and effect, the same having been given according to regulations prescribed by the Secretary of the Interior.

VII.

That on October 7, 1921, a bank examiner of the State of Oklahoma, in the discharge of his duties, made an investigation of the Oklahoma State Bank and found that it was insolvent and unable to pay its debts and unable to continue as a going banking concern; and accordingly he reported such facts to the bank commissioner of the State of Oklahoma, who, pursuant to the authority vested in him by the laws of that State, on October 26, 1921, adjudged the bank insolvent and thereupon took charge and possession, and still has charge and possession, of its assets, books, and records for the purpose of liquidation, and said bank on the date last mentioned was and still is insolvent.

VIII.

That on October 26, 1921, there was, and still is, due to the plaintiff from the Oklahoma State Bank the sum of $42,000, being the amount deposited with it as aforesaid, with interest from that date to the present time at the rate hereinbefore mentioned, none of which has been paid.

IX.

That section 3466 of the Revised Statutes of the United States provides:

> 'Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first sat-

isfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effect of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed.'

X.

That the assets of the Oklahoma State Bank now in the possession of the bank commissioner of that State are in excess of the plaintiff's claim of $42,000 and interest thereon as aforesaid, and the plaintiff is entitled to have its debts first satisfied and paid in full out of those assets before other creditors are paid anything.

XI.

That the plaintiff has demanded of the bank commissioner the payment of the said $42,000, with interest thereon from October 26, 1921, at the rate mentioned, out of the assets of the Oklahoma State Bank prior to the discharge of any other of its liabilities, but this demand has been refused by him on the ground that the State of Oklahoma, under its laws and especially under section 303, Revised Laws of Oklahoma of 1910, has a first lien upon the assets of the bank for the benefit of the depositors' guaranty fund, for the purpose of paying the bank's unsecured depositors and creditors; and upon the further ground that the plaintiff deposited the said sum with full knowledge of the statutory law of the State of Oklahoma which provides for and creates a lien for the benefit of unsecured depositors and creditors; that the plaintiff is therefore not entitled to have its debt paid until the lien of the State of Oklahoma for the benefit of unsecured depositors has been satisfied; that section 3466 of the Revised Statutes of the United States has no application

in the administration of the assets of insolvent banks in the State of Oklahoma; and that when the plaintiff made the deposit in the Oklahoma State Bank it thereby consented to the method of administration, in the event of insolvency, prescribed by the statutes of Oklahoma; and that the act of making the deposit constituted a waiver of the rights of the plaintiff under said section 3466.

XII.

That a controversy has therefore arisen between the United States of America and the State of Oklahoma as to priority of rights in the payment of debts due them from said bank; that the claim of the plaintiff is predicated upon section 3466 of the Revised Statutes, while the claim of the defendant is predicated upon the laws of the defendant State. The plaintiff avers that the priority accruing to it under the Revised Statutes aforesaid is superior to the assumed rights of the State of Oklahoma under the laws of that State; that the plaintiff in making the deposit of funds in said bank, as hereinbefore set forth, has not, by virtue of the statutory laws of Oklahoma under which the State is given a first and prior lien on all the assets of an insolvent bank in that State for the payment of unsecured creditors, waived or forfeited any of its rights or priorities given to it under the Revised Statutes of the United States.

Wherefore, the plaintiff prays that the defendant and its bank commissioner be perpetually enjoined from paying out or distributing any of the assets of the Oklahoma State Bank now in the possession or hereafter coming in the possession of the defendant through its bank commissioner, until the bank commissioner has fully paid the debt due to the United States on account of the aforesaid deposit; and that the defendant, through its bank commissioner, be required to pay the debt due the plaintiff, before paying out or making distribution of any

of the assets of said bank in the possession of the State, by reason of the administration of the affairs of that bank under the law of the defendant State, to any other person; and that the plaintiff may have such other and further relief to which in equity and good conscience it may be entitled.

(Signed) HARRY M. DAUGHERTY,
Attorney General.
JAMES M. BECK,
Solicitor General.

To this bill of complaint, the state of Oklahoma have filed their motion to dismiss, which is as follows:

Comes now the State of Oklahoma, by its Attorney General and moves the Court to dismiss the Bill of Complaint herein for the reason and on the ground that the allegations of said bill of complaint do not state facts sufficient to constitute a cause of action in favor of the plaintiff and against this defendant or to entitle the plaintiff to the relief prayed for, in this, to-wit:

A.

That Section 3466 of the Revised Statutes of the United States plead and relied upon by plaintiff herein are inapplicable and uninforceable against the State of Oklahoma, in its administration of the liquidation of the Oklahoma State Bank of Guthrie, Oklahoma.

B.

That the defendant, The State of Oklahoma, under the laws of Oklahoma as plead in the Bill of Complaint, has a lien on all of the assets of said Oklahoma State Bank of Guthrie, Oklahoma, for the reimbursement of the defendant by reason of the payment by it of the unsecured depositors of said bank, and that the alleged rights of the United States of America are inapplicable and unenforceable against the State of Oklahoma until the obligations

for which said lien is given is fully paid and satisfied.

C.

That said Section 3466 of the Revised Statutes of the United States is invalid in so far as the same asserts priority in payment of a debt due the United States in opposition to the payment of a debt due the State of Oklahoma.

Wherefore, The State of Oklahoma moves this Court to dismiss the Bill of Complaint herein and that defendant have its costs herein.

(Signed) GEORGE F. SHORT,
Attorney General.
WILLIAM H. ZWICK,
Assistant to the Attorney General.
Counsel for Defendant.

The Bill of Complaint and the Motion to Dismiss the same, calls for a judicial construction of Section 3466, 3467 and 3468 of the Revised Statutes of the United States. Section 3466 of the Revised Statutes of the United States, is as follows:

> "Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

Section 3467 of the Revised Statutes of the United States is as follows:

"Every executor, administrator, or assignee, or other person, who pays any debt due by the person or estate from whom or for which he acts, before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate for the debts so due to the United States, or for so much thereof as may remain due and unpaid."

Section 3468 of the Revised Statutes of the United States is as follows:

"Whenever the principal in any bond given to the United States is insolvent, or whenever, such principal being deceased, his estate and effects which come to the hands of his executor, administrator, or assignee, are insufficient for the payment of his debts, and, in either of such cases, any surety on the bond, or the executor, administrator, or assignee of such surety pays to the United States the money due upon such bond, such surety, his executor, administrator, or assignee, shall have the priority for the recovery and receipt of the moneys out of the estate and effects of such insolvent or deceased principal as is secured to the United States; and may bring and maintain a suit upon the bond, in law or equity, in his own name, for the recovery of all moneys paid thereon."

The priority or preference rights claimed by the United States of America, is derived from certain Acts of Congress, the first of which is contained in the Act of July 31, 1789, Section 21, 1st Statutes at Large, 42, which provides:

"And be it further enacted, that where any bond for the payment of the duties shall not be satisfied on the day it became due, the collector shall prosecute for the recovery of the money due thereon, by action or suit at law, in the proper court, having cognizance therein; and in all cases of insolvency, or where any estate in the hands of executors or

administrators shall be insufficient to pay all the debts due from the deceased, the debt due to the United States on any such bonds shall be first satisfied."

This Act was amended by the Act of August 4th, 1790, First Statutes at Large, 169, and is as follows:

"And be it further enacted, that where any bond for the payment of duties shall not be satisfied on the day it became due, the collector shall forthwith cause a prosecution to be commenced for the recovery of the money thereon, by action or suit at law, in the proper court having cognizance thereof; and in all cases of insolvency, or where any estate in the hands of executors or administrators shall be insufficient to pay all the debts due from the deceased, the debt due to the United States, on any such bond, shall be first satisfied."

The Act was again amended by the Act of May 2nd, 1792 being Section 18, First Statute at Large, 263, which Section is as follows:

"And be it enacted and declared, That if the principal, in any bond which shall be given to the United States, for duties on goods, ware, and merchandise imported, shall be insolvent, or if such principal being dead, his or her estate and effects, which shall have come to the hands of his or her executors or administrators, shall be insufficient for the payment of his or her debts, and if, in either of the said cases, any surety in the said bond, or the executors and administrators of such surety, shall pay to the United States the moneys thereupon due, such surety, his or her executors or administrators, shall have and enjoy the like advantage, priority and preference, for the recovery and receipt of the said moneys out of the estate and effects of such insolvent or deceased principal, as are reserved and secured to the United States, by the forty-fourth section of the act, entitled "An act to provide more effectually for the

collection of duties imposed by law on goods, wares, and merchandise imported into the United States, and on the tonnage of ships or vessels," and shall and may bring and maintain a suit upon the said bond, in law or equity, in his, her or their own name or names, for the recovery of the moneys which shall have been paid thereupon. And it is further declared, That the cases of insolvency in the said forty-fourth section mentioned, shall be deemed to extend, as well to cases in which a debtor, not having sufficient property to pay all his or her debts, shall have made a voluntary assignment thereof, for the benefit of his or her creditors, or in which the estate and effects of an absconding, concealed or absent debtor shall have been attached by process of law, as to cases, in which an act of legal bankruptcy shall have been committed."

This Act was again amended by the Act of March 3rd, 1797, as found in Section 5, First Statutes at Large, 515, which is as follows:

"And be it further enacted, That where any revenue officer, or other person hereafter becoming indebted to the United States, by bond or otherwise, shall become insolvent, or where the estate of any deceased debtor, in the hands of executors or administrators, shall be insufficient to pay all the debts due from the deceased, the debt due to the United States shall be first satisfied; and the priority hereby established shall be deemed to extend, as well to cases in which a debtor, not having sufficient property to pay all his debts, shall make a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor, shall be attached by process of law, as to cases in which an act of legal bankruptcy shall be committed."

The last Act, prior to the Revised Statutes of the United States, is the Act of March 2nd, 1799, being Section 65, First Statutes at Large, 676, which is as follows:

"And be it further enacted, That where any bond for the payment of duties shall not be satisfied on the day it may become due, the collector shall, forthwith and without delay, cause a prosecution to be commenced for the recovery of the money thereon by action or suit at law, in the proper court having cognizance thereof; and in all cases of insolvency, or where any estate in the hands of the executors, administrators or assignees, shall be insufficient to pay all the debts due from the deceased, the debt or debts due to the United States, on any such bond or bonds, shall be first satisfied; and any executor, administrator, or assignees, or other person, who shall pay any debt due by the person or estate from whom, or for which, they are acting, previous to the debt or debts due to the United States from such person or estate being first duly satisfied and paid, shall become answerable in their own person and estate, for the debt or debts so due to the United States, or so much thereof as may remain due and unpaid; and actions or suits at law may be commenced against them for the recovery of the said debt or debts, or so much thereof as may remain due and unpaid, in the proper court having cognizance thereof; Provided, that in all cases in which suits or prosecutions shall be commenced for the recovery of duties or pecuniary penalties prescribed by the laws of the United States, the person or persons against whom process may be issued shall and may be held to special bail, subject to the rules and regulations which prevail in civil suits in which special bail is required: And provided also, that if the principal in any bond, which shall be given to the United States for duties on goods, wares or merchandise imported, or other penalty, either by himself, his factor, agent, or other person for him, shall be insolvent, or if such principal being deceased, his or her estate and effects, which shall come to the hands of his or her executors, administrators or assignees, shall be insufficient for the payment of his or her debts, and if in either of the

said cases, any surety on the said bond or bonds, or the executors, administrators or assignees of such surety shall pay to the United States the money due upon such bond or bonds, such surety, his or her executors, administrators or assignees, shall have and enjoy the like advantage, priority or preference for the recovery and receipt of the said moneys out of the estate and effects of such insolvent, or deceased principal, as are reserved and secured to the United States; and shall and may bring and maintain a suit or suits upon the said bond or bonds in law or equity, in his, her, or their own name or names, for the recovery of all moneys paid thereon. And the cases of insolvency mentioned in this section, shall be deemed to extend as well to cases in which a debtor, not having sufficient property to pay all his or her debts, shall have made a voluntary assignment thereof, for the benefit of his or her creditors, or in which the estate and effects of an absconding, concealed or absent debtor, shall have been attached by process of law, as to cases in which an act of legal bankruptcy shall have been committed. And where suit shall be instituted on any bond for the recovery of duties due to the United States, it shall be the duty of the court, where the same may be pending, to grant judgment at the return term, upon motion, unless the defendant shall, in open court, the United States attorney being present, make oath or affirmation that an error has been committed in the liquidation of the duties demanded upon such bond, specifying the errors alleged to have been committed, and that the same have been notified in writing to the collector of the district, prior to the commencement of the return term aforesaid: whereupon, if the court be satisfied, that a continuance until the next succeeding term, is necessary for the attainment of justice, and not otherwise, a continuance may be granted until next succeeding term and no longer. And on all bonds upon which suits shall be commenced, an interest shall be allowed at the rate of six per cent per annum, from

the time when said bonds become due, until the payment thereof."

It is this latter Act which is now Section 3466, Revised Statutes of the United States, upon which the complainant claims the United States of America are entitled to a priority or preference in payment of its deposit in the Oklahoma State Bank of Guthrie, Oklahoma, now insolvent.

Statement of Facts.

The Oklahoma State Bank of Guthrie, Oklahoma, was, prior to October 26th, 1921, a banking institution organized under the laws of Oklahoma, and was engaged in the banking business at Guthrie, Oklahoma; that on said date the bank commissioner of Oklahoma, having examined into the assets and liabilities of said bank, found and so declared said bank to be in an insolvent condition, and he thereupon, and under the laws of the defendant state, took charge and possession of the records, books and assets of said bank, and proceeded to liquidate the same, as provided by law; that pursuant to the laws of Oklahoma, the bank commissioner finding the assets of said bank wholly insufficient to pay the depository liabilities of the bank, was compelled to, and did, pay to the unsecured depositors out of the Depositors' Guaranty Fund of the State of Oklahoma, the sum of $285,000.00 and in addition thereto, issued to the unsecured depositors of said bank, as provided by the laws of Oklahoma, Guaranty Fund Warrants, in the sum of $304,058.85; that out of the assets of said bank so taken over by the bank commissioner, he has not realized therefrom a sum sufficient to reimburse the defendant state for said payments made to the unsecured depositors of said bank, and that under Section 303 of the Revised

Laws of Oklahoma, 1910, the defendant is given a first lien upon the assets of said insolvent bank to indemnify it for the payments so made.

That the United States of America acting by, and through its Secretary of the Interior, and pursuant to Chapter 86, 40 Statute, 592, under rules and regulations promulgated by the Department of the Interior made a deposit of money in said Oklahoma State Bank, and that on the date of taking over of said bank by the bank commissioner of the State of Oklahoma, there remained the sum of $42,000.00 in said bank, credited upon the books thereof, to D. Buddras, cashier; that prior to the deposit of said moneys so made, the United States of America required, and the Oklahoma State Bank, executed a certain bond wherein the Oklahoma State Bank was principal, and the Fidelity and Casualty Company of New York, was surety, and the United States of America was obligee, in the principal sum of $52,000.00, and that said bond on the 26th day of October, 1922, was in full force and effect, and that the surety thereon is wholly solvent and stands ready and is able and willing to pay to the United States of America, the said deposit of $42,000.00, together with interest thereon, as provided in said bond upon the demand or request of the United States. That under the rules and regulations of the Department of the Interior, promulgated and approved October 15th, 1915, it is provided that the deposits of moneys belonging to any of the Five Civilized Tribes, shall be deposited by the Secretary of the Interior, only upon the receipt and approval of satisfactory bond or bonds in amounts equal to the maximum sum to be deposited, plus ten per cent to be approved both as to form and as to responsibility of surety by the said Secretary of the Interior, and that it was under said Act of Congress and said

rules and regulations of the Department of the Interior, that the said deposits were made in said bank, and the said surety bond executed by said bank and accepted by the Secretary of the Interior.

Argument and Authorities.

The State of Oklahoma by its motion to dismiss, takes the position that under the allegations of the bill of complaint, that its motion to dismiss must be sustained on the ground that Section 3466 of the Revised Statutes of the United States, does not give the complainant the priority or preference right to the payment of the debt due it. This for the reason that the United States of America cannot sustain its contention to have a debt due it paid prior to the payment to other creditors upon any claim or right of sovereignty, but that the sole grounds upon which it can sustain its claim must be by virtue of the act of Congress plead in its Bill of Complaint.

An analysis of the Act demonstrates that the Congress have made a legislative interpretation of the Acts of Insolvency referred to, therein, and have declared that the priority right of the United States only applies in the class of cases referred to in the act, namely:

A.

Where an insolvent debtor not having sufficient property to pay all his debts makes a voluntary assignment thereof.

B.

Or in which the estate and effects of an absconding, concealed or absent debtor are attached by process of law.

C.

As to cases in which an Act of bankruptcy is committed.

Unless the taking over the bank by the bank commissioner of Oklahoma, an executive officer of the State of Oklahoma, acting under the laws thereof, can be construed to bring such Act within one of the three designated Acts of Insolvency, then it is urged the Act cannot be applied. The Oklahoma State Bank, when it became financially embarrassed, did not make a voluntary assignment of its property and effects for the benefit of all of its creditors—on the contrary, the State of Oklahoma under its police power, and acting through its constitutional officers, and without the consent of the bank, took possession of its property for the purpose of its liquidation under the laws of Oklahoma. This Act cannot be construed to be a voluntary assignment, nor even an involuntary assignment.

It is not alleged in the Bill of Complaint, that such a voluntary assignment was made, and in the absence of such allegation the priority or preference right of the United States cannot be sustained. It is not alleged, nor will it be urged, that the estate and effects of said bank have been attached by a process of law, on the ground that the bank's officers have absconded, concealed or absented themselves from the place of business of said bank. Neither is it alleged in the Bill of Complaint, that the bank has or could have committed an Act of Bankruptcy. The mere insolvency of the bank is not sufficient to invoke the benefits of the Act of Congress, but the complainant must affirmatively allege that the bank being insolvent has brought itself, by its own act, within one of the provisions of the Act. These views are fully sustained by the decisions of this court.

As early as 1838, this court, in the case of *George Beaston, Garnishee of the Elkton Bank of Maryland*, vs. *The Farmers Bank of Deleware*, 12 Peters, page 102, 9 L. Ed. page 1017, has so construed the act in that case. The facts were these: An attachment at the suit of the Farmers Bank of Deleware was issued against the effects of the Elkton Bank on the 24th of September, 1830, and under it were attached the funds of the Elkton Bank in the hands of George Beaston, its debtor. On the 8th day of July, 1831, an attachment was issued at the suit of the United States, the United States being creditors of the Elkton Bank, and it was laid on the same funds which had been previously attached at the suit of the Farmers Bank of Deleware. It was there held:

> "The money thus attached by the Farmers Bank of Deleware, in the hands of George Beaston, a debtor to the Elkton Bank, by legal process, before the issuing of the attachment in behalf of the United States, was bound for the debt for which it was first legally attached, by a writ, which is in the nature of an execution; and the right of a private creditor thus acquired, could not be defeated by the process subsequently issued at the suit of the United States."

The United States claimed that the funds of the Elkton Bank, in the hands of George Beaston, should by virtue of Section 3466 of the Revised Statutes of the United States be subjected to the payment of its debt, in preference to the rights of the Farmers Bank of Deleware, notwithstanding the latter bank had prior to the attachment of the United States laid an attachment against the same fund by legal process.

It was urged by counsel for Beaston:

A. That by a proper construction of that Act, he having paid to the United States the amount which he owed to the Elkton Bank, is not liable to the Farmers Bank of Deleware.

B. That the appointment of receivers by the Circuit Court with power to take possession of the property of the Elkton Bank, and to sell and dispose of the same, and to collect all debts due it, was such an assignment of its property as to give the right of priority to the United States.

C. That the election of trustees by the stockholders of the bank, under the Act of Maryland Legislature, was also such an assignment of the property of the bank as to give the right of priority to the United States.

Counsel for the Farmers Bank of Deleware resisted all the grounds assumed by counsel for Beaston and insisted that by a fair construction of the 5th Section of the Act, and the former adjudications of this court, the priority therein provided for would not attach to the fund belonging to the Elkton Bank, in the hands of Beaston.

This Court, in construing the Act of Congress in its opinion delivered by Mr. Justice M'Kinley, says:

> "From the language employed in this Section, and the construction given to it from time to time by this court, these rules are clearly established:
>
> "1st. That no lien is created by statute;
>
> "2nd. The priority established can never attach while the debtor continues the owner and in possession of the property although he may be unable to pay all his debts;
>
> "3rd. No evidence can be received of the insolvency of the debtor until he has been divested of his property *in one of the modes stated in the Section;* and

> "4th. Whenever he is thus divested of his property, the person who becomes invested with the title is thereby made a trustee for the United States, and is bound to pay their debt first, out of the debtor's property."

After the United States had obtained its judgment against the Elkton Bank of Maryland, and had issued an execution thereon, and the same was returned *nulla bona*, it filed a bill in equity for the appointment of receivers, with authority to take possession of the property of said bank and dispose of the same, and to collect all debts due it, and under this application an order was made, appointing receivers who thereupon gave bond and proceeded to execute their trust.

It was contended by the United States that the appointment of the receivers to take charge of the insolvent Elkton Bank of Maryland, such appointment and action thereunder, had the legal effect of an assignment of the bank's property, as would bring in play the act of Congress. This contention of the United States was not sustained, this court holding:

> "If the District Court of the United States has a right to appoint receivers of the property of an insolvent bank which is indebted to the United States, for the purpose of having the property of the bank collected and paid over to satisfy the debt due to the United States by the bank, this would not be a transfer and possession of the proprety of the bank within the meaning of the Act of Congress, and the right of the United States to a priority of payment would not have attached to the funds of the bank."

The Elkton Bank of Maryland in this case, under the agreed statement of facts was insolvent and was unable to pay its debts. While in this condition, its

acting president and directors applied to the Legislature of Maryland for a bill authorizing them and the bank's stockholders to select trustees for the purpose of liquidating the affairs of the bank.

The Legislature of Maryland as requested at its December session in 1829, passed an Act, Chapter 170, authorizing the bank to select trustees with authority to take charge of all of the bank's assets and liquidate its indebtedness. Under the Act of the Legislature of Maryland, certain trustees were selected by the bank who refused to act. It was contended also by the United States that the selection of the trustees under the Legislative Act was such a transfer of the bank's property which would give the United States priority in payment of its debt out of the assets of said bank, in the hands of the trustees. In answer to this contention of counsel, this court holds:

> "The Legislature of Maryland passed an act authorizing the stockholders of the Elkton Bank to elect trustees who were to take possession of the funds and property of the bank for the purpose of discharging the debts of the bank and distributing the residue of the funds which might be collected by them, among the stockholders. This, had the law been carried into effect, was not such an assignment of all of the property of the bank as would entitle the United States to a priority of payment, out of the funds of the bank."

This case conclusively establishes that banks may be wholly insolvent, and, therefore, no longer be permitted to exercise their franchises, and yet not bring them within the terms of the Act of Congress here relied on, for the reason that the taking possession of the banks property by the State of Oklahoma

through its bank commissioner would not be such a transfer and possession of the property of the Oklahoma State Bank within the meaning of the Act of Congress, and, therefore, the priority claimed by the United States would not attach against its funds or assets.

It is provided by Section 302 of the Revised Laws of Oklahoma, 1910, under what conditions the bank commissioner may wind up the affairs of a state bank in Oklahoma. This Act provides:

> "Whenever any bank or trust company organized or existing under the laws of this State shall voluntarily place itself in the hands of the bank commissioner, or whenever any judgment shall be rendered by a court of competent jurisdiction, adjudging and decreeing that such bank or trust company is insolvent, or whenever its rights or franchises to conduct a banking business under the laws of this State shall have been adjudged to be forfeited, or whenever the bank commissioner shall become satisfied of the insolvency of any such bank or trust company, he may, after due examination of its affairs, take possession of said bank or trust company and its assets, and proceed to wind up its affairs and enforce the personal liability of the stockholders, officers and directors."

It will be observed that a bank may be taken charge of by the bank commissioner under three conditions:

1st. That it voluntarily place itself in the hands of the commissioner.

2nd. When a court of competent jurisdiction shall adjudge it to be insolvent, or its rights or franchises to conduct a banking business shall have been adjudged forfeited, and

3rd. Whenever the bank commissioner shall be-

come satisfied of its insolvency, he may take possession thereof, and wind up its affairs.

As the Act of the Legislature of Maryland, authorizing the appointment of trustees to liquidate the bank of Elkton, was held not to be such a transfer of the bank's property as would bring it within the terms of the Act of Congress, so the Legislative Act of the State of Oklahoma, under which this insolvent bank was taken over by its bank commissioner cannot be construed to give the United States the priority or preference rights contended for.

In the citation of authorities, reference is frequently made to Section 5 of the Act of March 3rd, 1797, Chapter 74. This Act in every essential feature is identical with Section 65 of the Act of March 2nd, 1799, which is now Section 3466 of the Revised Statutes of the United States.

In 1814, this Court in the case of *Prince* v. *Bartlett*, reported in the 8th Cranch, 431, 3rd L. Ed. 614, construed the act of Congress in question. The facts in this case were: In June, 1810, certain merchandise, property of Wellman and Ropes, were attached by the Sheriff under writs of attachment issued by a creditor of Wellman and Ropes. On the 18th of September, 1810, an execution was issued on a judgment recovered by the United States against Wellman and Ropes, and on the following day attachments in favor of the United States were issued directed to the marshal to levy upon the goods previously attached by the sheriff. Under this latter attachment, the marshal forcibly broke into the building containing the merchandise which had been attached by the Sheriff, took possession thereof, and disposed of it in satisfaction of his judgments. The debtors, Wellman and Ropes, continued in business until the 4th day of

June, and then failed, and then were and ever since have continued to be, debtors, unable to pay their debts. Wellman continued at his usual place of abode ever since his failure, and did not for any whole day confine himself within his house, but sometimes kept his person within doors, and his doors fastened, and occasionally used other vigilance and caution to avoid arrest of his person for two or three weeks following the said fourth of June, but was never arrested by any officer or pursued for that purpose. Ropes always continued at large in Salem, and has never confined or concealed himself from his creditors at any time.

In an action of trover, commenced by the Sheriff against the marshal, judgment was rendered for the defendant. On appeal it was decided that the several matters produced and proved on the part of the defendant were not upon the whole case sufficient to maintain the issue on the part of the defendant, and to bar the plaintiff of his action. The cause was then removed by writ of error to this court. The sole question for consideration of this court, is whether the priority to which the United States is entitled by law, attaches in this case. In the opinion delivered by Judge Duvall, this Court held:

> "This priority is given by the 5th section of the act of the 3d of March, 1797, chap. 74. It is also given by the 65th section of the collection law in the words following: 'and in all cases of insolvency, or where any estate in the hands of the executors, administrators or assigns shall be insufficient to pay all the debts due from the deceased, the debt or debts due to the United States on any such bond or bonds shall be first satisfied.' In the same section the legislature explain their meaning of insolvency by declaring that it shall be deemed to extend as well to cases in which a debtor, not having sufficient prop-

erty to pay all his debts, shall have made a voluntary assignment thereof, for the benefit of his creditors, or in which the estate and effects of an absconding, concealed or absent debtor, shall have been attached by process of law, as to cases in which an act of legal bankruptcy shall have been committed."

"It is admitted that the property seized by the attachments and executions before stated was insufficient to satisfy the several claims exhibited, and that Wellman and Ropes were unable to pay their debts, but it does not appear that their property was attached as the effects of absconding, concealed or absent debtors; nor does it appear, or is it even alleged that they or either of them have made a voluntary assignment of their property for the benefit of their creditors; nor is it alleged that either of them has committed an act of legal bankruptcy. It appears to be the true construction of the act to confine it to the cases of insolvency specified by the legislature. Insolvency must be understood to mean a legal and known insolvency manifested by some notorious act of the debtor pursuant to law, not a vague allegation, which, in adjusting conflicting claims of the United States and individuals, against debtors it would be difficult to ascertain.

"The property in question being in the possession of the sheriff by virtue of legal process, before the issuing the writ on behalf of the United States, was bound to satisfy the debts for which it was taken; and the rights of the individual creditors thus acquired could not be defeated by the process on the part of the United States subsequently issued."

We challenge the Court's attention that in the *Beaston* v. *Farmers Bank of Delaware* case, (*supra*) that the case was decided upon the point that there was no voluntary assignment of all of the Elkton Bank's property, for the benfit of its creditors, as provided by one of the methods in the Act of Congress, and, therefore, the Act

of Congress was inapplicable and unenforceable in that case.

So, in the case of *Prince* v. *Bartlett*, (*supra*) the claim of priority of the United States was not sustained on the specific ground that the debtors, Wellman and Ropes, although largely indebted to the United States, and being insolvent and unable to pay their debts, had not been brought within the terms of the Act, in that their goods and effects had not been attached by process of law, on the ground that they were absconding, concealed or absent debtors.

It will be noticed that in the latter case, the finding of fact was that Wellman had continued at his usual place of abode in Salem ever since his failure, and had not for any whole day confined himself within his house, but has sometimes kept his person within doors, and had his doors fastened, and occasionally used other vigilance and caution to avoid arrest of his person for two or three weeks next following the date of his failure. Had it been found as a matter of fact, that the debtors, Wellman and Ropes, had within the purview of the Act of Congress, absconded, concealed or absented themselves, then the attachment laid upon their goods, could have been sustained under the Act.

It was held in this case, that the Legislature explained their meaning of insolvency by declaring that it shall be deemed to extend as well to cases in which a debtor not having sufficient property to pay all his debts, shall have made a voluntary assignment thereof, for the benefit of his creditors, or in which the estate and effects of absconding, concealed or absent debtors shall have been attached by process of law, as to cases in which an act of legal bankruptcy shall have been committed.

Chief Justice Marshall, in 1804, in the case of the *United States* v. *Fisher et al.*, reported in 2nd Cranch, 358; 2nd. L. Ed. 304, rendered the opinion of this Court, construing the Acts of Congress here relied on. It is there said:

> "On this subject, it is to be remarked that no lien is created by this law; no bona fide transfer of property in the ordinary course of business is overreached. It is only a priority of payment, which, under different modifications, is a regulation in common use; and this priority is limited to a principal state of things when a debtor is living; although it takes effect generally if he be dead."

And again it is said:

> "On the 2nd day of May, 1792, Volume 2, page 78, the priority previously given to the United States is transferred to the surety on duty bonds, who shall themselves pay the debt; and the cases of insolvency, in which this priority is to take place, are explained to comprehend the case of a voluntary assignment, and the attached effects of an absconding, concealed or absent debtor."

A year later, Marshall again writes the opinion of this Court, in the case of the *United States* v. *Hooe*, 3rd Cranch, 73, 2nd L. Ed., 370. In construing the Act of Congress, it is there held:

> "The words of the Act extend the meaning of the word 'Insolvency' to cases where a debtor not having sufficient property to pay all his debts, shall have made a voluntary assignment thereof, for the benefit of his or her creditors. The word 'property' is unquestionably all the property which the debtor possesses; and the word 'thereof' refers to the word 'property,' as used, and can only be satisfied by an assignment of all the property of the debtor."

Had the Legislature contemplated a partial assignment,

the words "or part thereof" or others of a similar import, would have been added.

It the case of *United States* v. *Fisher*, (*supra*) it was held that the United States were entitled to the priority of payment out of the effects of the bankrupt, in the hands of the assignee.

The first Bankruptcy law in the United States, was passed in 1800. Marshall then in Congress, was the author of this Legislation. This Act remained in force until December 19th, 1803, at which time it was repealed.

The decision of the Court in the *United States* v. *Fisher*, (*supra*) was based specifically upon the ground that the attachment was laid by the United States on the property of the bankrupt, in the hands of the collector of Newport in Rhode Island, *after the commission of bankruptcy had issued*.

So, in this case, the decision was based upon the third provision of the Act of Congress, that the priority of the United States extends "to cases in which an Act of Bankruptcy is committed." When the term "act of bankruptcy" was used, Congress had in mind the meaning of the term as used in the old English sense.

Marshall so held in the case of *Sturges* v. *Crowinshield*, 4th Wheat. 122; 4th L. Ed. 529. The Act of Congress becomes applicable only where an "Act of Bankruptcy" is committed. There is a distinction between laws of Insolvency and Bankruptcy. One may be insolvent and unable, in the ordinary course of business to pay his debts, but unless some Act of Bankruptcy is committed by the debtor of the United States, their priority cannot attach.

In the earliest Act of Bankruptcy, Statutes 34 and 35, (year 1542-3), Henry VIII, Chapter 4, it will be found

that an overt act accompanied by some wrong intent must be committed by the insolvent to make him a bankrupt. The language provides:

> "Divers and sundry persons craftily obtaining into their hands great substances of other mens goods, do suddenly flee to parts unknown, or keep to their houses, not minding to pay or restore to any of their creditors their debts and duties, but at their own wills and pleasures consume the substances obtained by credit of other men, for their own pleasure and delicate living, against all reason, equity and good conscience."

The first Bankruptcy Act of the United States, passed in 1800, follows in its general features, and even in its wording, the English Bankruptcy laws, and was essentially a law against debtors framed along the line of suppressing fraudulent and criminal practices, rather than along the lines of providing a general system for the rational administration of insolvent estates, no provision at all being made for one voluntarily to become a bankrupt, the distinguishing feature of the later bankruptcy laws, without which a bankruptcy law cannot be said to have arrived at the full statute of a general system of administering insolvent estates, which it is at present.

It was the English Acts of bankruptcy of Henry VIII, (supra) and its numerous amendments, that Congress had in mind when it passed the priority or preference statute, under which the Act was made to apply in cases in which "an Act of Bankruptcy" is committed.

In *United States* v. *Fisher*, (*supra*) the Act of Bankruptcy having been committed, and a commission of Bankruptcy having issued, it was determined that the United States were entitled to be paid first out of the assets of the insolvent estate, in the hands of his assignees.

The distinction between "Insolvency" and "Bankruptcy" is defined in Ballentines Law Dictionary, where these definitions may be found:

> "An Act of Bankruptcy—An Act by the doing of which a debtor may be declared a bankrupt.
>
> "Insolvency—Inability to pay debts as they become due in the ordinary course of business."

So in Second Blackstone's Commentaries, 471,

> "Act of Bankruptcy—An Act which subjects a person to be proceeded against as a bankrupt."
>
> "Bankruptcy: Originally and strictly a trader who secretes himself, or does certain other acts intending to defraud his creditors."

So in Jacobs Law Dictionary, printed in England in 1744:

> "By a bankrupt with us signifieth generally, man or woman that living by buying and selling, hath gotten other men's goods with his or her hands, and hideth himself in places unknown or in his own house in order to deceive or defraud his creditors." Inst. 4, 277:
>
> "A banker who hath many peoples' money in his hands, refuses payment yet keeps his shop open, and as often as he is arrested gives bail; by this means he may give preference of payment to his friends; and if when he hath done, he runs away, such payment shall stand against a commission of bankruptcy."

And so in 1778, Sir William Blackstone, in the eighth addition of his Commentaries on the laws of England, Chapter 31, 477, says:

> "To learn what the particular acts of bankruptcy are which render a man bankrupt, we must consult the several statutes and the resolutions formed by the Courts thereon."

He then enumerates many acts which constitute an act of bankruptcy such as:

1st. Departing from the realm.

2nd. Departing from his house with intent to avoid his creditors.

3rd. Keeping his own house with the same intention.

4th. Procuring his arrest.

5th. Procuring his goods to be attached by process of law.

6th. Making fraudulent conveyances of his property.

7th. Eluding the justice of the law.

8th. Compelling creditors to take less than due them.

9th. Lying in prison without giving bail.

10th. Escaping from prison after arrested.

11th. Neglecting to make satisfaction of a just debt within two months after legal service.

As the bankruptcy laws of England were founded upon the theory that the insolvent debtor must commit some overt act with a fraudulent intent against his creditors, so was the term used in the Act of Congress under discussion. We submit that no Act of the bank in the instant case, brings it within the purview of this law.

In the year 1817, in an opinion delivered by Washington, J., *Thelusson et al.*, vs. *Smith*, 2nd Wheat. 396; 4th L. Ed. 271, this court was again called upon to construe this Act of Congress. The facts in this case were that Thelusson, in May, 1805, obtained a judgment against one William Crammond. Exceptions were filed and overruled, and a judgment was finally entered on the 15th of May, 1806. On the 22nd of May, 1805, Cram-

mond executed a conveyance of all of his estate to trustees for the payment of his debts, at which time he was indebted to the United States on several duty bonds which became due at different periods subsequent to the 22nd day of May, 1805. The Government obtained judgment against Crammond upon these duty bonds, and a portion of his landed estate was levied upon and sold to apply on the judgment. Controversy arose as to whether the judgment obtained by Thelusson, being in point of the priority to the conveyance of his estate to trustees for the benefit of his creditors should be satisfied out of Crammond's estate prior to the claims of the United States, under the Act of Congress of March 2nd, 1797. It was stipulated by the parties in writing, that on the 22nd day of May, 1805, Mr. Crammond was unable to satisfy all his debts, and that this fact should be considered as part of the special verdict. It was further in evidence that the assignment made by Crammond on the 22nd day of May, 1805, was a voluntary assignment of all his estate for the benefit of all his creditors. The Circuit Court gave judgment against the plaintiff below, and the cause was brought by Writ of Error to this Court.

The question for the court's consideration was, "When does a judgment nisi have the effect of creating a lien on the debtors property?"

If from the time when the judgment nisi is entered; then whether in this case the United States are entitled to be paid in preference to the judgment creditor.

Speaking for this Court, Washington, J., says:

"In considering this question, it will be assumed for the sake of argument that the judgment nisi binds the real estate of the debtor from the time it is rendered. This question did not arise in the case of the United States vs. Fisher et al., or in that

of the United States vs. Hooe, et al. The point decided in those cases was that a mere state of insolvency or inability of a debtor to the United States, to pay all his debts, gives no right of preference to the United States, unless it is accompanied by a voluntary assignment of all the property for the benefit of his creditors."

"In this case, the conveyance of Crammond, on the 22nd day of May, 1805, was all of his property; at which time he was unable to pay all his debts; it is, therefore, a case precisely within the law, and within the principle decided by the above cases."

The reason for the holding of this court, in this case, that the United States were entitled to a priority in payment of the debt due them, out of Crammond's estate, was specifically based upon the fact in that record, that he, the debtor, had made a voluntary assignment of his property for the benefit of all his creditors.

Under the law of Pennsylvania, the judgment obtained by Thelusson had not ripened into a lien upon the estate of Crammond, for the reason that under the law of Pennsylvania, a lien is only perfected under a judgment when an execution is levied thereon. Had this execution actually issued, prior to the general assignment made by Crammond, the priority rights of the United States would not have been sustained. It is said in the opinion:

"If there, therefore, before the right of preference has accrued, to the United States, the debtor has made a bona fide conveyance of his estate to a third person, or has mortgaged the same to secure a debt, or if his property has been seized under a fi fa., the property is divested out of the debtor and cannot be made liable to the United States."

The earliest case to which our attention has been called, which gives a judicial construction of this Act

of Congress, is case 15,536, *United States* vs. *King*, 26 Federal case, page 788. The facts were these: The United States had obtained judgments against the partnership of Johnson and Daniel King on certain Custom House Bonds, and issued executions which were levied on a cargo of wines from Cadiz, in the hands of the defendant, (James King). He claimed these wines under an assignment and bill of sale from the house of Johnson and Company, antecedent to the judgments. The question was, whether, under certain Acts of Congress, the execution should have priority of the assignments; it being pointed out that if they had, the defendant would pay the amount from the proceeds in his hands. On the trial, which was long, the following points arose and were ruled by the courts unanimously:

> "We are clearly of opinion, that it is not every case of actual insolvency which is within the words or intent of the Acts of Congress. Traders in business and continuing so may be really insolvent; they may be so unknown to themselves, and frequently unknown to mankind. It would be productive of the greatest injustice, and serve to embarrass and check mercantile transactions, if the right of a creditor to retain his payment, or transfer of property in payment, as against Custom House Bonds, was to depend upon future scrutiny on the part of the United States into the actual condition of the debtor's affairs, at the time of the payment, sale or assignment; it would lead to inextricable difficulties. Our opinion is that the Act of the 2nd of March, 1799, in its terms and meaning, only gives a preference as against other creditors on Custom House Bonds, after a notorious Act of Insolvency; as where the debtor has assigned, for the benefit of his creditors; where he has absconded and his property is attached, etc. In the case before us, although when the assignment was made, it is probable the House was really insolvent, yet no Act of Bankruptcy had been com-

> mitted; no assignment made to any one creditor of all the effects; no attachment had issued; no transfer made to assignees for the benefit of all or any particular creditor. This, therefore, is not a case of insolvency within the Acts of Congress, under which the United States claim a preference, so as to avoid the assignment made to the defendant."

In the case of *John Conard, Marshal of the Eastern District of Pennsylvania, plaintiff in error*, vs. *Francis H. Nicholl*, 4th Peters, 291, 7th L. Ed., 862, this Act of Congress was again drawn in question. Washington, J., who had delivered the opinion of this Court in *Thelusson* vs. *Smith*, (*supra*), tried the *Conard* vs. *Nicholl* case in the Circuit Court, and his charge to the jury is reported in full in this case. To demonstrate that the Court conceived it to be the law that before the United States would be entitled to a priority in payment of its debt out of the insolvent debtor's estate, that there must be an assignment of the whole of the property of the debtor, we respectfully call the Court's attention to Washington's charge in the Circuit Court. The charge is:

> "I take the rule as now well settled by the Supreme Court, to be that the preference of the United States does not extend to cases where the debtor has not made an assignment of the whole of his property. If the assignment leaves out a trifle, or part of his property for the purpose of evading the Act giving the preference, it will be considered as a fraud upon the law and the Court will treat it as a total divestment."

Justice Baldwin, in delivering the opinion of the Court, says this case has been submitted without argument. It is in all leading features, both in points of law, which arose, and evidence given at the trial, so similar to the case of *Conard* vs. *the Atlantic Insurance Company*, decided by this Court at the January term, 1828,

1st Peters, 386, that we do not think it necessary to enter into any examination of the principles upon which the judge submitted the case to the jury. They appear to us to be in perfect accordance with the opinion delivered in that case on great deliberation; of the entire correctness of which we do not entertain a doubt.

Judge Washington also gave his charge to the jury in the Circuit Court in the case of *John Conard* vs. *the Atlantic Insurance Company of New York*, 1st Peters 386, 7th L. Ed., 189, and Mr. Justice Story delivered the opinion of this Court therein. The case was this: An action of trespass de bonis asportatis, brought in the Circuit Court of the district of Pennsylvania by the Atlantic Insurance Company to recover against the defendant, John Conard, the marshal of that district, the value of certain teas shipped on the ships Addison and Superior, and levied upon by him, upon an execution in favor of the United States, against one Edward Thomson, as the property of the latter. The only question in the case, is whether the Insurance Company, or the United States, are entitled to the teas, or their proceeds. Mr. Justice Story delivering the opinion of this Court, says:

> "Before proceeding to the discussion of the right of the insurance company over the property in question, it may be well to consider what is the nature and effect of the priority of the United States, under the statute of 1799, ch 128. Although that subject has been several times before this court, the observations which have fallen from the bar show that the opinions of the court have, sometimes, not been understood according to their true import. The 65th section of the act declares that 'in all cases of insolvency, or where any estate in the hands of executors, administrators and assignees shall be insufficient to pay all the debts due from the deceased, the debt or debts due to the United States, etc., shall be first satisfied; and any executor, admin-

istrator, or assignees, or other person, who shall pay any debt due by the person or estate from whom, or for which they are acting, previous to the debt or debts due to the United States from such person or estate being first duly satisfied and paid, shall become answerable in their own person and estate for the debt or debts so due to the United States, or so much thereof as may remain due and unpaid; and actions or suits at law may be commenced against them for the recovery of the said debt or debts, or so much thereof as may remain due and unpaid, in the proper court having cognizance thereof; A subsequent clause of the same section declares that 'the cases of insolvency mentioned in this section shall be deemed to extend as well to cases in which a debtor not having sufficient property to pay all his or her debts, shall have made a voluntary assignment thereof for the benefit of his or her creditors, or in which the estate and effects of an absconding, concealed, or absent debtor shall have been attached by process of law, as to cases in which an act of legal bankruptcy shall have been committed.' It is obivious that this latter clause is merely an explanation of the term 'insolvency,' used in the first clause, and embraces three classes of cases, all of which relate to living debtors. The case of deceased debtors stands wholly upon the alternative in the former part of the enactment. *Insolvency, then, in the sense of the statute*, relates to such a general divestment of property as would in fact be equivalent to insolvency in its technical sense. It supposes that all the debtor's property has passed from him. This was the language of the decision in the case of the United States v. Hooe, 3 Cranch, 73, and it was consequently held that an assignment of part of the debtor's property did not fall within the provision of the statute. So, too, a mere inability of the debtor to pay all his debts is not an insolvency within the statute; *but it must be manifested in one of the three modes pointed out in the explanatory clause already referred to.*"

Ten years later, in 1838, Joseph Story, Associate Justice of the Supreme Court, sitting with Ashur Ware, District Judge in the Circuit Court of the United States, October term, 1838, at Wiscasset, delivered the opinion of the Court, in the case of the *United States* vs. *Thomas McLellan, and others*, 3rd Summers reports, page 345. The question in this case was whether a conveyance by a debtor, known to be insolvent, of all his property to one or more creditors in discharge of their own debts and liabilities not exceeding the amount due and payable by them, and not for the benefit of creditors generally, or any other creditors, than the immediate grantees, is a "voluntary assignment" to creditors within the purview of the Act of 1799, Chapter 128, Section 65, so as to be effected by the priority of the United States unless it appear that it was made with the intent to evade the priority given, by the Act, to the United States. In the opinion delivered by Justice Story, it is held:

> "It is unnecessary, after the various decisions which have been made by the Supreme Court of the United States, upon this subject to enter at large upon the construction of these Sections."

By the Act of 1799, Chapter 125, Section 65, it is provided, that,

> "In all cases of insolvency, or where any estate in the hands of the executors, administrators or assigns, shall be insufficient to pay all the debts due from the deceased, the debt or debts due to the United States on any such bond or bonds (for duties), shall be first satisfied."

If the clause had stopped here, it would have been open to consideration whether the insolvency here mentioned was not a mere inability of the debtor to pay all his debts, without the open, notorious act, pointed out

by law, to establish such insolvency, but the Section goes on to declare,

> "and the cases of insolvency, mentioned in this Section, shall be deemed to extend as well to cases in which a debtor not having sufficient property to pay all his or her debts shall have made a voluntary assignment thereof, for the benefit of his or her creditors; or in which the estate or effects of an absconding, concealed or absent debtor shall have been attached by process of law, as to cases in which an act of legal bankruptcy shall have been committed."
>
> "Now upon the original interpretation of this Act, it might well have been a question whether the three cases thus put were anything more than mere illustrations of the general insolvency spoken of in the preceeding clauses of the Act. But this question has long since been put at rest by the Supreme Court of the United States in a variety of cases, and especially in the case of Price vs. Bartlett, 8th Cranch, 431; Thelusson vs. Smith, 2nd Peters, 396; Conard vs. the Atlantic Insurance Company, 1st, Peters, 387; Conard vs. Nicholl, 4th Peters, 291, and Beaston vs. the Farmers Bank of Deleware, 12th Peters, 102, in which it has been held that mere inability of the debtor to pay his debts, is not an insolvency within the meaning of the statute; but that it must be such as is manifested in one of the three modes pointed out in the last explanatory clause."

Again on page 357 of the report, it is said:

> "I take the naked question, then, stripped of all unimportant circumstances to be whether a conveyance by a debtor, known to be insolvent, of all his property to one or more creditors in discharge of their own debts, and liabilities, not exceeding the amount due and payable by them, and not for the benefit of creditors at large, or of any other creditors than the immediate grantees, is such a voluntary assignment as is within the purview of the Section of the Act of 1799? That it is a case within

the same mischief as that against which the Act meant to provide, I admit. That if the case had been wholly untouched by authority there might have been strong ground to contend that the three cases put in the Act were rather illustrations of the meaning of the word "insolvency" as used in the Act, than exclusive limitations on the meaning, I also admit. But looking to the decisions which have been made, I do not feel warranted in saying that such conveyances as the present are voluntary assignments, for the benefit of creditors, within the meaning of the Act unless, indeed, it could be shown that they were made with the intent to evade the priority given by the Act."

In *Robert Y. Brent*, vs. *The Bank of Washington*, 10th Peters Reports, 596; 9th L. Ed., 574, the facts were these: Robert Brent was the holder of six hundred fifty-nine (659) shares of stock of the Bank of Washington; he was also their debtor by reason of his endorsement of certain notes held by the Bank. He was the paymaster of the United States Government, and was largely indebted to it. He made a general assignment of all his property for the benefit of creditors but the trustees refused to act. He subsequently died and his property passed into the hands of executors. The specific contention in this case was that the United States claimed priority in payment of a debt due it under the Act of Congress and that the priority rights so established overreached the lien of the bank on its stock for a debt due it. It was held in the opinion written by Justice Baldwin that the lien given by the charter of the Bank upon Brent's stock was paramount to the rights of the United States under the Act of Congress.

We cite this case to again show that in all cases where the Act of Congress was relied upon as giving the United States the priority rights claim that it was based either upon the assignment of the debtor's prop-

erty for the benefit of his creditors or the decease of the debtor, and the distribution of his property by his administrators or executors—in other words that the priority was never recognized by the Courts under this Act of Congress, unless it was brought within one of the provisions of the Act itself.

In the case of the *United States* vs. *the State Bank of North Carolina*, 6th Peters, 29, 8th L Ed., 308, to which Mr. Justice Brandeis in the opinion of this court in the *United States* vs. *National Surety Company*, 254 United States, 74; 65 L. Ed., 143, makes reference.

It will be observed that in the former case, the United States by suit in the nature of a bill of equity, were seeking to recover against the State Bank of North Carolina and one Talcott Burr as assignee, of one William H. Lippett, the amount of Custom House Bonds owed by Lippett to the United States. In the case, Lippett, having become insolvent, made a voluntary assignment of all of his property to Burr, for the benefit of his creditors, by which assignment he gave a preference right to the State Bank of North Carolina, before payment to the United States.

The question for the Court's decision was whether the proiority of the United States, attaches, in case of a general assignment made by the debtor of his estate for the payment of his debts, comprehends a bond for the payment of duties executed anterior to the date of assignment, but payable afterwards. This Court held that:

> "The priority of the United States extends as well to debts by bonds for duties which are payable after the insolvency or decease of the obligor, as to those actually payable or due at the period thereof."

Again it will be observed that the decision in this

case came within that term of the Act of Congress which provides:

> "And the priority herein established shall extend as well to cases in which a debtor not having sufficient property to pay all his debts makes a voluntary assignment thereof."

This is the judicial construction given to this Act of Congress for more than a century. Should it now be overriden to give to the United States a priority in payment under conditions not incorporated in the Act itself? This right of priority of payment of debts due the government is a prerogative of the Crown of England well known to the common law. But here the claim of the United States to priority does not stand on any sovereign prerogative but is exclusively founded on the actual provisions of our own statutes. This received construction will induce this Court to hesitate before it will adopt another; as it would open those long established settlements, and would be productive of great difficulty and confusion.

Another early case decided within a year after the passage of the Act of Congress involved herein, which construes said Act, is the case of *James Gallagher against George Davis*, by the Supreme Court of the State of Pennsylvania, reported in the 2nd Yates, page 548, in which it is held:

> "A surety in a bond for duties on goods on importation into the United States, who pass the same to the Custom House, has no preference for his debt where the principal absconds as an insolvent person, unless he has made an assignment; or process in the nature of a domestic attachment has issued against him, or he has been declared a bankrupt."

The law of the Union does not apply to the case

stated. Congress in the clause of the 18th Section of the Act of the 2nd of May, 1792, have made a legislative declaration for the sense in which the words "cases of insolvency" shall be taken, and they must be restricted thereby to the three instances pointed out by the counsel for the defendant.

In the case of *M'Lean against Rankin and Hayer,* 3rd Johnson's Reports, 281, the Supreme Court of New York construing the Act of Congress herein involved, held:

> "To entitle the United States to a preference over other creditors, it must be shown that the debtor was insolvent and had voluntarily assigned all his property for the benefit of his creditors, or that an attachment has been taken out against his property as an absconding and absent debtor, and prosecuted to effect. If an attachment is taken out and afterwards withdrawn by consent of creditors, without any proceedings over it, it is inoperative, and gives no right of preference to the United States."

The Circuit Court of Appeals of the Eighth Circuit, on December 8th, 1919, in the case of the *American Surety Company of New York,* vs. *The Carbon Timber Company, et al.,* 263 Federal Reporter, page 295.

The opinion of the Court was written by Elliott, J.,; the facts were these:

The Carbon Timber Company being insolvent executed a trust deed, transferring all its property except that mortgaged to secure bonds to trustees, the property to be sold and the proceeds applied to the payment of their debts. The American Surety Company being on a Surety Bond of the Carbon Timber Company to the United States, were compelled to pay to the United

States, under their indemnity bond, a certain sum of money. The contention was made by The Carbon Timber Company, that the deed of trust executed by it was not such a transfer of its property as would bring in play Section 3466 of the Revised Statutes of the United States.

In the opinion it is said:

"The defendants prosecute the cross appeal with various assignments of error alleged to be so closely related that they are discussed by counsel together. It is especially urged that the trust deed executed by the Timber Company to defendants, Meyer and Olson, is not a deed of general assignment within the contemplation of Sections 3466 to 3468, inclusive, of the Revised Statutes of the United States which provide a priority of payment of debts due the United States, asserting that the instrument itself does not purport to be a deed of general assignment, etc."

The Court further in the opinion says:

"The facts are practically all admitted. There is so little controversy upon any material fact, that it is not worthy of discussion here. The Carbon Timber Company was insolvent when this conveyance was made; it transferred its property to the defendants, Meyer and Olson, as trustees, for the benefit of its creditors; all of the property then owned by it, except certain property that was contained in the deed of trust to secure payment of its bonds then outstanding, was transferred. Under the provisions of this deed, and the record as to the disposition of the property of the Timber Company by the trustees, this is clearly a case within the instrument, so termed a 'deed of trust', was in truth and fact an assignment for the benefit of creditors."

The Court further said:

"Applying the provisions of this statute to the facts alleged in the Bill of Complaint, both as stated

originally, and as amended, the Trial Court rightfully found that the plaintiff had brought itself within the provisions of the statute and was entitled to priority for the amounts so paid by it. It is admitted that The Carbon Company did not have property sufficient to pay its debts at the time it made this voluntary assignment, and, therefore, under the provisions of this statute, the debts due the United States have priority and must first be satisfied."

The most recent judicial construction of this Act is the case of *Davis, Director-General of Railroads*, v. *Pullen*, decided January 6th, 1922, in the first Circuit and reported in 277 Federal Reporter, at page 650. This recent expression of the Court with reference to the construction of the Act, shows the construction placed thereon in the cases heretofore cited.

In this case, the insolvent debtor consented to the appointement of a receiver of his property for distribution among his creditors. The consent to the receivership had the same legal effect as a voluntary assignment of the debtor's property to a Assignee for the benefit of his creditors.

As was said by Anderson Circuit Judge, writing the opinion:

> "Certainly when a debtor has assented to the appointment of a receiver on a bill which prays that its debts may be established and ordered to be paid out of its assets, and when on marshalling the assets and liabilities, it appears that such debtor is, and was, at the beginning of the proceedings hopelessly insolvent, it would seem plain that such insolvency was sufficiently notorious to bring the case within the fair meaning of the words "bankruptcy" and "insolvency" as used when the priority statute was enacted. There is no doubt that the assets of this corporation in custodia legis are being distributed to its creditors because it is in fact insolvent,

and because the proceedings by which it was disposed of its property *were assented to, if not indirectly invoked by it.*"

This, the latest expression of a Court construing the Act, conclusively shows that this case was brought within that provision of the Act of Congress which provides for the voluntary assignment of the insolvent's estate, for the benefit of all his creditors.

Marshall had, as shown by the cases cited, for a period of 35 years, as the Chief Justice of this court, given this act of Congress the construction now being urged by the State of Oklahoma. This great judge, the leading Federalist of his time, was ever sedulous in construing acts of Congress within the Constitution to be the paramount law of the land, and that acts of the legislatures of the states in opposition thereto must fall. This great principle of law was first declared by his opinion in the *McCullough* vs. *Maryland case*, *supra*. As startling as was this principle of the law to the Republicans of that day, it was not more so than his decision in the case of *United States* v. *Fisher*, *supra*, the leading case announcing the priority rights of the United States in the collection of debts due it from its debtors; and yet, in all of the opinions of this court during his long tenure as its Chief Justice, it will be found that the act of Congress was held to apply only under the modifications contained therein.

Marshall died on the 6th day of July, 1835. Only a few months before, at the January term, 1835, of this court, for the last time he was called upon to declare this court's opinion on the construction to be given to this act of Congress. It was in the case of *Field* v. *The United States*, 9 Pet., 182, 9 L. Ed., 94. In this case again, the priority rights of the United States were sustained upon the specific grounds that the debtor had made a

voluntary assignment of his estate to syndics for distribution to his creditors. In the opinion it is said:

> "The claim of the United States to the payment of the debt due to them out of the funds in the hands of the syndics is founded upon the priority given them by the 65th section of the Duty Collection Act of 1799, chap. 128; which in cases of general insolvency and assignment, like the present, provides that the debts of the United States shall be first satisfied out of the funds in the hands of the assignees."

The Legislative definition of the Act of Insolvency declared in this Act of Congress and its judicial construction have not been challenged for more than a century and will now withstand the assault made against them.

The act of Congress, Section 3466, Revised Statutes (Compiled Statutes 6372) directing that " debts due the United States shall be first satisfied", does not extend to cases where a particular State has a lien.

As early as 1805 the Supreme Court of Pennsylvania, construing the Acts of Congress giving priority in payment to it out of an insolvent debtor's estate, have held that where the State has a lien against the estate of the insolvent, that it is superior to the priority rights of the United States. It was so held in the case of the *United States of America against William Nicholls*, 4 Yeates, 251.

It is said in the opinion written by Yeates, Judge:

> "I can not bring myself to believe, notwithstanding the generality of the words used in the 5th section of the Act of Congress of 3rd March 1791, 'debts to the United States shall be first satisfied', that the provision therein contained was ever intended to extend to cases where an individual state was a creditor and as such was entitled, under its municipal laws, to a lien on

the estate real or personal, of the insolvent debtor. No section or clause in any part of the Act respects in the most distant manner the several states in their political and corporate capacity as competitors with the United States; but on the contrary every regulation and provision of the Act is confined to the settlement of accounts between the United States and individual citizens."

Under and by virtue of a legislative Act of Pennsylvania of 1785, it was provided:

> "That certain settlements made by the comptroller, with certain prescribed formalities, are declared to be liens upon the Real Estate of the debtor; in the same manner as if judgment had been given in favor of the commonwealth against such person for such debt in the Supreme Court."

The law of Pennsylvania of 1785 did not provide a procedure for the enforcement of the state's lien and not until the Act of 1785 was amended by the Acts of 1806 and 1807, was a remedy given to enforce the lien of the State of Pennsylvania upon the insolvent debtor's lands.

In 1833, twenty-two years after the decision in the Pennsylvania case, the legislative Acts of Pennsylvania referred to, were drawn in question in a case submitted to the Supreme Court of the United States. In *Lessee of Edward Livingston* vs. *Moore et al.* reported in 7th Peters at page 469, 8th Law Edition, page 751, this court construing the Pennsylvania Acts in its opinion delivered by Justice Johnson says:

> "The great proportion of the arguments for plaintiffs, both here and below, were devoted to the effort to prove that the two settlements enumerated were not subsisting liens at the time of passing of the two Acts of 1806 and 1807 under which the sale was made to the defendants. But from this,

as a subject of adjudication, we feel relieved by the two decisions cited from the 4th volume of Yeates Reports, since it appears that this very lien of the 3rd of March 1796, has been sustained by a decision of the highest tribunal in that State as long ago as 1803. (Daniel Smith vs. John Nicholson, 4th Yeates); and that again in 1805, this decision was considered and confirmed in another case in which the several applications of the principles established in the first case came under consideration." (U. S. of America vs. Wm. Nichols 4th Yeates 251).

It is further said:

> "The titles to the lands under the Acts of the Legislature of the State of Pennsylvania, providing for the sale of the landed estate of John Nicholson, in satisfaction of the liens of the State held on those lands, and the proceedings under the same are valid. These Acts and the proceedings under them do not contravene the provisions of the Constitution of the United States in any manner whatsoever."

It was argued in the *Livingston case* that the Acts of Pennsylvania were unconstitutional in that the Commissioners appointed under the Acts were given authority to sell the land of the insolvent debtor and that the Act failed to provide a remedy to be followed in the courts of the State. It was argued that the community sits in judgment in its own cause when it confirms the debt to be due for which the land is subject to sale and then subjects the land to sale to satisfy its own decision thus rendered. Answering this contention in opposition to the Acts referred to, this court says:

> "This view of the Acts of the State is clearly not to be sustained by a reference to the facts of the case. As to the judgment of 1797; that is un-

questionably a judicial Act as to the settled accounts, the lien is there created by acts of men who quoad hoc were acting in a judicial character; and their decision being subject to an appeal to the ordinary or rather to the highest of the tribunals of the country, gives to those settlements a decided judicial character: *and were it otherwise, how else are the interests of the State to be protected?* The body politic has its claim upon the constituted authorities as well as individuals and if the plaintiffs course of reasoning could be permitted to prevail, it would then follow that provisions might be made for collecting the debts of everyone else, but those of the States must go unpaid whenever legislative aid became necessary to both. This would be pushing the nature and reason of things beyond the limits of natural justice."

As the laws referred to gave that state a statutory lien upon all of the real estate of the insolvent debtor, so does the statutory laws of Oklahoma give the State a lien upon all of the assets of an insolvent State Bank, in the event of the Bank's insolvency under conditions hereafter referred to. The validity of any lien on the property of a bankrupt and insolvent debtor must always be determined by the State law. It is so determined by all of the authorities and so held specifically *in re United States Lumber Company*, 206 Federal Reproter, page 236.

Under the law of Oklahoma as found in Section 302 of the Revised Laws of Oklahoma, 1910, the bank commissioner is given authority, when he becomes satisfied of the insolvency of a State Bank, and after due examination of its affairs, to take possession of said Bank and all its assets, and is authorized to proceed to wind up its affairs and enforce all liabilities due it.

By statutory enactment by the Legislature of Oklahoma, there is created a Depositors' Guaranty Fund by levying against the capital stock of a State Bank an annual assessment equal to one-fifth of one per cent of its average daily deposits during its continuance as a banking corporation, which fund shall be used solely for the purpose of liquidating deposits of failed banks and of retiring Warrants provided for in said Act.

The Act further provides that in the event that the funds so created shall be insufficient to pay the depositors of failed banks, the Banking Board of Oklahoma shall have authority to issue certificates of indebtedness to be known as Depositors Guaranty Fund Warrants of the State of Oklahoma, in order to liquidate the deposits of said failed banks. (Section 3, Chapter 22, of the Session Laws, 1913, of Oklahoma).

It is further provided by the statute law of Oklahoma, (Section 303 of the Revised Laws of Oklahoma, 1910) as follows:

> "In the event that the bank commissioner shall take possession of any bank or trust company which is subject to the provisions of this chapter, the depositors of said bank or trust company shall be paid in full, and when the cash available or that can be made immediately available of said bank or trust company is not sufficient to discharge its obligations to depositors, the said banking board shall draw from the depositors' guaranty fund and from additional assessments, if required, as provided in Section 300, the amount necessary to make up the deficiency; and the State shall have, for the benefit of the depositors' guaranty fund, a first lien upon the assets of said bank or trust company, and all liabilities against the stockhold-

ers, officers and directors of said bank or trust company and against all other persons, corporations or firms. Such liabilities may be enforced by the State for the benefit of the depositors' guaranty fund."

It is under and by virtue of this legislative act of Oklahoma it is claimed that it has a lien upon all of the assets of an insolvent bank which is superior to the priority rights of the United States under the acts of congress plead in plaintiff's complaint.

It is alleged in the Bill of Complaint, (page 6, paragraph 7) that on the 26th day of October, 1921, the bank commissioner of the State of Oklahoma, pursuant to the authority vested in him by the laws of that State, adjudged the Oklahoma State Bank of Guthrie, Oklahoma to be insolvent, and thereupon took charge and possession of its assets for the purpose of liquidating the same.

It is further plead by the complainant, (page 8, paragraph 11) that the repayment of the sum of $42,000.00 on deposit in said Oklahoma State Bank, to the credit of the United States, was refused on the ground that the State of Oklahoma under its laws and especially under Section 303 of the Reviesd Laws of Oklahoma, 1910, has a first lien upon the assets of said bank for the benefit of the Depositors' Guaranty Fund, for the purpose of paying the bank's unsecured depositors, and that the complainant is therefore not entitled to have its debt paid until the lien of the State of Oklahoma for the benefit of the unsecured depositors has been satified; and that said Section 3466 of the Revised Statutes of the United States has no application in the administration of the assets of an insolvent bank in the State of Oklahoma.

There will be no controversy that the deposit of $42,000.00 in the Oklahoma State Bank of Guthrie, Oklahoma, was made by one D. Buddrus as cashier of the Five Civilized Tribes of Indians in Oklahoma; that to secure the repayment of said deposit the government through the Secretary of the Interior took a surety bond from said bank to protect and guarantee the prompt repayment of said deposit and that the surety on said bond is wholly solvent, able to, and would pay said sum to the United States upon its demand. That pursuant to said Section 303 of the Revised Laws of Oklahoma, 1910, (supra) the depositors of said Oklahoma State Bank were paid in full out of the Depositors' Guaranty Fund of Oklahoma, the sum of $285,000.00 and Guaranty Fund Warrants were paid them in the sum of $304,058.85, and it is by reason of these payments, under the laws of Oklahoma, that the defendant, the State of Oklahoma, claims a lien upon the assets of said bank which is superior to any rights of the United States of America under said Section 3466 of the Revised Statutes of the United States.

Since the decision of this court in the case of *Noble State Bank* vs. *C. N. Haskell, Governor of Oklahoma*, 219 U. S. 104, 55 L. Ed., 112, the constitutionality of the Oklahoma law creating its Depositors' Guaranty Fund can no longer be challenged, it being said by this court in its opinion delivered by Justice Holmes:

> "The levy and collection, under a state statute, from every bank existing under the state laws, of an assessment based upon average daily deposits, for the purpose of creating a depositors' guaranty fund to secure the full repayment of deposits in case any such bank becomes insolvent, is a valid exercise of the police power, and cannot

be regarded as depriving a solvent bank of its liberty or property without due process of law."

The Legislative Act of Oklahoma, 303, (*supra*) under which this lien is claimed has been frequently construed by the Supreme Court of Oklahoma. It is said, in its opinion in the case of *Lankford* vs. *Schroeder*, 147 Pacific Reporter, page 1049:

> "The State Guaranty Fund is the property of the state as much as ad valorem taxes collected for the state's maintenance, *and the state has a first lien on the assets of a failed bank in the hands of the state bank commissioner*, to secure reimbursement of the Guaranty Fund for sums paid therefrom to the depositors of said bank, and no suit can be maintained by a creditor of the bank against the bank commissioner for the application of such assets or Guaranty Fund to the payment of his claim."
>
> "A suit against the state bank commissioner to compel him to pay a debt against a failed bank out of the State Guaranty Fund, or out of the assets of such bank, in his hands, as such officer, under the banking law, is in effect a suit against the state and cannot be maintained without the state's consent."

Again in the case of *Lankford, state bank commissioner*, vs. *Oklahoma Engraving and Printing Company*, 130 Pacific, page 278. In construing Section 323, Compiled Laws, 1909, which is now Section 303 Revised Laws, 1910, which provides that the state shall have, for the benefit of the Depositors' Guaranty Fund, a first lien upon the assets of any defunct bank or trust company, and all liabilities against the stockholders, officers or directors thereof, and against all persons, corporations or firms; and that such liabilities may be enforced by the state for the benefit of the

Depositors' Guaranty Fund. That the effect of this statute is to make the state a preferred creditor until any deficiency in the Guaranty Fund created by the payment therefrom of the depositors of an insolvent bank is made up.

Again in the case of *State ex rel. Taylor, state examiner*, vs. *Cockrell, state bank commissioner*, 112 Pacific, page 1000, it is held:

> "The title of such depositors' Guaranty Fund vests in the state just as much as the common school lands or the proceeds of the sale of the same, and the taxes levied and collected for the maintenance and support of said schools, all of which are held in trust by the state for a specific purpose."

It has been further determined that no deposit in a state bank, otherwise secured, is protected by, or payable out of the State Guaranty Fund or the assets of an insolvent bank. This holding applies to all deposits whether of a private charter or deposits belonging to the state or a municipality thereof.

> *Lovett et al, Creek County Commissioners*, vs. *Lankford*, 145 Pacific Reporter, page 767.
>
> *Columbia Bank and Trust Company*, vs. *United States Fidelity and Guaranty Company*, 126 Pacific Reporter, page 556.
>
> *National Surety Company*, vs. *State Banking Board*, 152 Pacific Reporter, page 389.

The principle of law laid down in these decisions were challenged on constitutional grounds. In the case of *Lankford* vs. *Platt Iron Works Company*, 235 United States, 461; 59 L. Ed. 316. In the opinion of this court delivered by Justice McKenna, it is said:

"The validity under the police power of Oklahoma laws under which a Bank Depositors' Guaranty Fund is created by the levy of an assessment upon the state banks for the purpose of securing the full repayment of deposits in case any such bank becomes insolvent is not effected because the state instead of committing the fund to the mere ministerial administration of the state banking board, and subjecting them to controversies with depositors may have vested the title to the fund in itself, so as to extend to the board the state's immunity from suit.

The title of the state to the Bank Depositors' Guaranty Fund created under Oklahoma laws by levy of an assessment upon state banks to secure the full repayment of deposits in case any such bank becomes insolvent and the interest which the state has, that such fund be administered by the State Banking Board appointed under the statute for that purpose, rather than by a judical tribunal, are such that a suit brought by a depositor in an insolvent bank to compel such board to pay the deposit out of the fund, or if that be insufficient, to issue a certificate of indebtedness and levy an assessment to make up the deficit in the fund, is a suit against the state, which under United States Constitution, 11th Amendment, cannot be maintained without the state's consent."

In the opinion it is further said:

"It, (the state) is given a lien upon the assets of insolvent banks and upon all liabilities against their stockholders, officers, directors and against other persons, which may be enforced by the state for the benefit of the fund which its law has created."

In the *Lankford* vs. *Platt Iron Works Company* case the court had before it for judicial construction, the effect of Section 303 of the Revised Laws of Oklahoma (*supra*) under which the state claimed a prior

lien upon the assets of an insolvent bank, and it was specifically held that the lien so created under the state law could not be successfully challenged on constitutional grounds—the court saying:

> "Certainly this construction can be given to the Oklahoma statute and granting that it may admit of dispute, an important element to be considered is the decision of the state tribunal."

The court cites in support of its holding, the holding of the Supreme Court of Oklahoma, in the case of *State ex rel. Taylor*, vs. *Cockrell; Lovett* vs. *Lankford; Lankford* vs. *Oklahoma Engraving and Printing Company; Columbia Bank and Trust Company* vs. *United States Fidelity and Guaranty Company* (*supra*); and sustains the validity of the lien of the State of Oklahoma upon the authority of these cases.

It is not contended by the State of Oklahoma that the United States must by reason of the Oklahoma law, and their judicial construction by the courts, be compelled to submit its claim for payment to the banking board of Oklahoma. The government has the right, if the act of Congress is applicable to the administration of an insolvent state bank in Oklahoma to pursue the funds of the bank in the hands of the commissioner, or sue him if a distribution is made without paying the claim. It has been determined in the case of *Lewis, trustee*, vs. *the United States*, 92 U. S. Reports, 617, that the United States was under no obligation to prove its debt in the bankruptcy proceedings.

In *United States* vs. *Herron*, 20 Wallace Reports, 251 it was held,

> "that no general words in the statute divest the government of its rights or remedies."

It is not contended that the insolvency laws of the

state can override a valid act of Congress in opposition therewith.

Ever since the decision in *M'Culloch* vs. *the State of Maryland*, 4th Wheaton, 316; 4th L. Ed. 579, it has been settled that:

> "The states have no power by taxation or otherwise, to regard, impede, burden, or in any manner control the operations of the constitutional laws enacted by congress to carry into effect the powers vested in the national government."

The state of Oklahoma, under its statutory lien contends that whatever rights the government of the United States has, under the act of Congress relied on, is subject to, and inferior to the rights of the state of Oklahoma. It has never been determined that the rights of the United States to priority in payment out of the assets of an insolvent debtor, overrides any transfer of the debtor's property in the usual course of business or disturbs any lien attaching thereto, general or specific.

As early as 1804, in the opinion of this court delivered by Chief Justice Marshall, in the case of the *United States*, vs. *Fisher et al*, 2nd Cranch, 358; 2nd L. Ed. 304. it was held:

> "On this subject it is to be remarked that no lien is created by this law. No bona fide transfer of property in the ordinary course of business is overreached. It is only priority in payment which under different modifications is a regulation in common use; and this priority is limited to a particular state of things when the debtor is living; though it takes effect generally if he be dead."

That no lien was created by the statute was again affirmed in the opinion of this court, written by Chief

Justice Marshall in 1805. In the case of the *United States* vs. *Hooe*, reported in the 3rd Cranch, 73; 2nd L. Ed. 370, it is said:

> "The United States have no lien on the real estate of their debtor until suit brought or a notorious insolvency or bankruptcy has taken place, or being not able to pay all his debts, he has made a voluntary assignment of all his property, or the debtor having adsconded, concealed or absented himself, his property has been attached by process of law."

Again in *Thelusson* vs. *Smith*, reported in the 2nd Wheaton, page 396, 4th L. Ed. 271, this court held:

> "But if before the right of preference has accrued to the United States, the debtor has made a bona fide conveyance of his estate to a third person, or has mortgaged it to secure a debt, or if his property has been siezed under an execution, the property is divested out of the debtor and cannot be made liable to the United States."

In the opinion delivered by Washington J., it is further said:

> "Exceptions there must necessarily be as to the funds out of which the United States are to be satisfied, but there can be none in relation to the debts due from the debtor of the United States to individuals; the United States are to be first satisfied; but then it must be out of the debtor's estate. If therefore, before the right of preference has accrued to the United States, the debtor has made a bona fide conveyance of his estate to a third person, or has mortgaged the same to secure a debt, or if his property has been siezed under a fi. fa., the property is divested out of the debtor and cannot be made liable to the United States."

In the case of *John Conard* v. *Atlantic Insurance Company, New York*, 1st Peters 386, 7th Law Edition, 189, in the opinion of the Court written by Mr. Justice Story, it is said:

> "But it has never yet been decided by this court that the priority of the United States will divest a specific lien attached to a thing, whether it be accompanied by a possession or not."
>
> "The case of Tullison vs. Smith 2nd. Wheaton 396, turned upon its own particular circumstances and did not establish any principles different from those which are recognized in this case. And it established no such proposition as that a specific and perfected lien would be displaced by the mere priority of the United States."

In the case of *Robert Y. Brent, Surviving Executor of Robert Brent, Use of the United States, Appellant*, v. *The President and Directors of the Bank of Washington*, 10 Pet., 596, 9 L. Ed., 547, in the opinion of this court, delivered by Justice Baldwin, it is held:

> "This preference is in the appropriation of the debtor's estate; so that if, before it has attached, the debtor has conveyed or mortgaged his property, or it has been transfered in the ordinary course of business, neither are overreached by the statute; and it has never been decided that it affects any lien, general or specific existing when the event took place which gave the United States a claim of priority."

In this case Robert Brent was the holder of 659 shares of stock in the Bank of Washington, and was indebted to the bank as endorser on certain promissory notes, one of which became due after his death. He was also indebted to the United States as pay-master, and he made an assignment of his property to satisfy the debt. The assignee did not accept the assignment. He died

some time afterwards. The bank, under the provisions of their charter, which gives a lien on the stock held by a debtor for the payment of debts due to them before the transfer of such stock held by a stockholder, insisted on the lien against the claim of priority by the United States, and their claim was sustained by the court.

As the Bank of Washington's lien under its charter was held to give it a superior claim upon the stock issued by it, in the hands of the executors of Robert Brent as against the priority rights of the United States, so the statutory lien, Section 303 of Revised Laws, Oklahoma, 1910, gives the defendant state a lien upon all of the assets of the Oklahoma State Bank, insolvent, superior to the priority rights of the United States herein.

This Act of Congress does not apply in the liquidation of an insolvent National Bank. To sustain the provisions of the Act in the liquidation of the State Banks in Oklahoma, will directly affect the interests of many thousands of creditors of such banks. Rigorous law is often rigorous injustice. Ever since Oklahoma was admitted to the sisterhood of states, it has had a banking system, the constitutionality of which, shortly after its enactment, was assailed, but it constitutionality was sustained by this Court in the case of *Noble State Bank* vs. *Haskell*, 219 U. S. 104; 55 L. Ed. 112. Under the provisions of this law the unsecured debtors of a bank in the event of the bank's insolvency are paid in full out of the Depositors' Guaranty Fund. This fund is created by assessment against the state banks, and also by the collection of the assets of insolvent banks, after the depositors of the banks are paid in full.

This is the fund that has been held by this court in the case of *Lankford* vs. *Platt Iron Works*, 235 U. S. 461, 59 L. Ed., 361, to be a fund of the State as much as the

common school funds were funds of the state, and that the state had a first and prior lien against the assets of every insolvent state bank, for the purpore of indemnifying it for the money advanced out of the fund, in the payment of the bank's unsecured depository creditors. It is only the unsecured depositors who are paid out of the fund. The United States of America was not an unsecured depositor in the Oklahoma State Bank. It made its deposit under, and by virtue of an Act of Congress approved May 25th, 1918, Chapter 86, 40 Stat. 561, 592, and under the rules and regulations promulgated by the Department of the Interior, which Act of Congress authorized the deposit to be made, provided it be secured by the deposit of United States Bonds, and the rules and regulations of the Department of the Interior provided the taking by the Secretary of the Department for the benefit of the United States, satisfactory bond or bonds in amount equal to the maximum sum so deposited.

Pursuant to the Act of Congress and the rules of the Department of the Interior, there was executed by the Oklahoma State Bank of Guthrie, a Depository Bond upon which the Fidelity and Casualty Company of New York were surety, and the United States of America was obligee, in a sum exceeding the amount of the deposit involved in this case.

This bond at the time of the insolvency of the Bank was in full force and effect. The surety upon the bond will pay to the government of the United States the amount of its obligation upon demand. This being a secured deposit, it is one which, under the laws of Oklahoma, is not protected by, or payable out of the Depositors' Guaranty Fund. It has been so held by the Supreme Court of Oklahoma in the case of *Columbia Bank and Trust Company* vs. *United States Fidelity and Guaranty Company*, 126 Pacific 556, decided in 1912.

In 1915, there was passed a legislative Act, Section 5, Chapter 58, Session Laws of Oklahoma, 1915, which is as follows:

> "On and after the passage and approval of this Act, in all cases where a surety company is compelled to pay, or voluntarily pays, a deposit of any state, county, municipal or other public funds for which it is liable in a failed bank, operating under the banking laws of this state, such surety company shall be entitled to participate in a pro rata division of the proceeds of the assets of any such bank with the depositors' guaranty fund; and the Bank Commissioner shall have exclusive control of the administration and collection of the assets of failed banks, in which any part of the depositors' guaranty fund has been used for payment of depositors, until the depositors' guaranty fund is fully reimbursed and the Banking board shall pay to such surety company its pro rata share of the proceeds of such assets from time to time as collections from such assets are made; and such surety company in writing a depository bond for any such bank specifically agrees to such administration and that the Bank Commissioners jurisdiction shall be exclusive. All public deposits secured by surety company bonds or by the assets of any bank shall be included in the computations of average daily deposits as a basis for assessments for the depositors' guaranty fund."

It may be suggested by counsel for the complainant, that this Act of the Legislature of Oklahoma, does not affect the rights of the United States given them by the Act of Congress relied on.

To this we answer, that if the Secretary of the Interior makes a simple demand for the payment of the debts due the United States from the surety company on its bond, that the United States will no longer

have an interest under its bill of complaint, and then the surety company writing the bond under the laws of Oklahoma will receive the benefits of that law, as it was contemplated they should receive, when entering into its contract of indemnity.

The surety upon the bond, however, is vitally interested in obtaining from this Court, a judicial construction of the Act of the 2nd of March, 1799, which will relieve them entirely from any obligation, under their indemnity contract.

We are now confronted by the discovery of an Act of Congress passed 124 years ago, the original purpose of which was to give the United States, under certain modifications, priority rights in the collection of a debt due it from its revenue officers.

It is true that the maxim, "*Cessante ratione legis, et ipsa lex*" has no application to statutory law, and in consequence it occasionally happens that a statute enacted to meet conditions long passed, is forgotten for several generations and then resurrected by someone desirous of causing trouble.

As before suggested, the Act of Congress does not apply to the liquidation of a national bank. It was so held in the case of *United States* vs. *Cook County National Bank*, 107 United States, 445. The Court in passing upon this case, did not consider, nor did it pass upon the question as to whether the taking over of a national bank by the comptroller of the currency and placing all its affairs in the hands of a receiver for liquidation brought the bank within the terms of the Act of Congress relied upon, to create a preference right in behalf of the United States, in the payment of a debt due it from such bank.

The Court, however, did specifically hold that the United States was relegated to the same class as other general creditors of the bank and denied its right to payment in preference over such other creditors.

The United States should not be given a greater right in the payment of a debt due it from a state bank, than from a bank under its own creation.

We do not contend that the Legislative Act of Oklahoma which gave to it a lien upon all of the assets of an insolvent state bank is such an Act as can override a constitutional Act of Congress, but we do most seriously urge that the Act of Congress relied upon here, gives a legislative definition of the term "Insolvency" to mean to be a voluntary assignment of all of the debtor's property for the benefit of his creditors. This view is fully sustained by the authorities we have cited.

If the Oklahoma State Bank, although unable to meet its obligations in the usual and customary manner has not, as the Act of Congress provides, made a voluntary assignment of its property, or if its estate and effects have not been attached as an absconding, concealed or absent debtor by process of law, or if the bank has not committed an Act of bankruptcy as such Act is known under the law, then the Act is inapplicable and unenforceable as applied to the liquidation of this bank.

We urge three grounds in our motion to dismiss the bill of complaint:

1st. That the Act of Congress properly construed does not bring the liquidation of the Oklahoma State Bank of Guthrie within its purview and terms.

2nd. That the State of Oklahoma, by reason of its

Depositors' Guarantly law has a first and superior lien upon the assets of the insolvent Oklahoma State Bank of Guthrie, and that whatever rights the United States may have under the Act of Congress are subject to the prior rights of the State of Oklahoma under its laws, and

3rd. That the Act of Congress relied on is unenforceable and inapplicable where a sovereign state is a creditor of the debtor.

We submit to this Honorable Court these three propositions in opposition to the granting of the relief to the United States as prayed for in its bill of complaint, confidently believing that they are supported by the laws of the land.

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